

**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

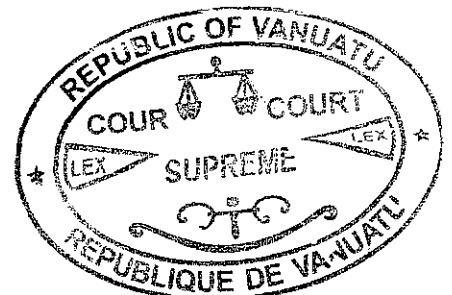
AND: FONCIERE DU VANUATU LIMITED
Second Defendant

Date of Hearing: 24 October 2024
Date of Decision: 15 November 2024
Before: Justice M A MacKenzie
Counsel: Mr. R. Willie for the Claimant- via telephone link, Santo Courthouse
Mr. J. Malcolm for the First and Second Defendant

JUDGMENT

Introduction

1. The Claimant and the Second Defendant are the registered proprietors of lease titles adjacent to each other in Luganville, Santo. Both front the road.
2. The Claimant purchased lease title 03/0184/002 in 2022. The title was transferred on 11 August 2022. The Second Defendant is the registered proprietor of lease title 03/0184/021. The First Defendant occupies the property.
3. There is a dispute between the Claimant and the Defendants about a 4 metre "servitude" recorded on the plan of the Second Defendant's lease title. The Claimant alleges he has a legal right to access his property via the servitude shown on the Second Defendant's lease title plan. 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.
4. The Defendants acknowledge they have prevented the claimant from accessing the property. This is because the Defendants dispute that the servitude gives the Claimant



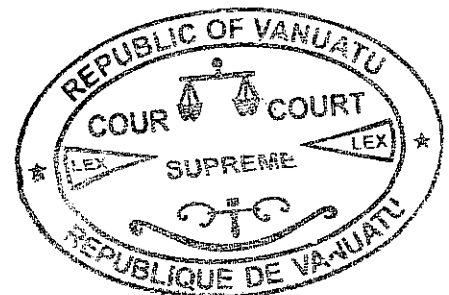
a legal right to access the property occupied by the First Defendant, particularly as the Claimant has access to his property as it fronts the road.

The claim

5. The Claimant alleges that:
 - (a) there is a 4 metre right of way created through the Second Defendant's property which gives him an overriding interest as provided for under s 17(a) of the Land Leases Act [CAP163].
 - (b) The existence of the right of way is confirmed by the sketch map of lease title 03/0184/021 and the letter of Ngwango Land Survey Services dated 3 January 2023.
 - (c) The Defendants' actions in denying the entrance, access and enjoyment of the right of way has made it difficult for the Claimant to enjoy the right of way created through the Second Defendants' property,
6. 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, and damages in the sum of VT 5,000,000.

The defence

7. 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.
8. 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 issues

9. The parties agree that there is a 4 metre strip across lease title 03/0184/021 with the words, "*servitude*" (4m large) written on the title plan, and that it is a right of way. It is not in dispute that there is a lack of evidence about a number of matters pertinent to the creation of the right of way: when the right was placed over the title, as to any document or agreement or award as between neighbouring landowners or other parties, as to the length of time of the right, and what the right actually is other than disputed opinion evidence.¹
10. The key disputed issue is whether the servitude shown on the title plan of lease 03/0184/021 is a right of way granting the Claimant access through the Second Defendant's property to the Claimant's property?
11. One of the difficulties for the Claimant is that the claim, as pleaded, does not address how the servitude was created, or the essential characteristics of an easement. If the claim had addressed those matters, the evidence could have focussed on those issues.

What is a servitude?

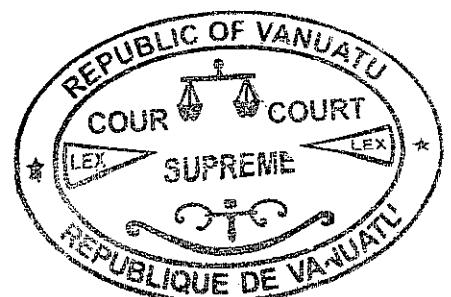
12. The starting point is to determine what a servitude is, as the Land Leases Act [CAP 163] does not contain any reference to a servitude.
13. In *Re Ellenborough Park* [1955] 3 ALL ER 667, the English Court of Appeal said that easements were commonly called by the latin name of "*servitudes*". According to Halsbury's Laws of England², an easement is a servitude, but "*servitude*" is a wider term and includes both easements and profits a prendre.
14. Therefore, the term servitude includes easements.

Easements

15. 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.

¹ The Claimant did not file a memorandum setting out the agreed and disputed facts as directed on 3 July 2024. However, Mr Malcolm filed a statement of agreed and disputed facts on behalf of the Defendants. When making oral submissions, Mr Willie confirmed that he agreed with the statement of agreed and disputed facts filed by Mr Malcolm

² Fifth edition, 2017



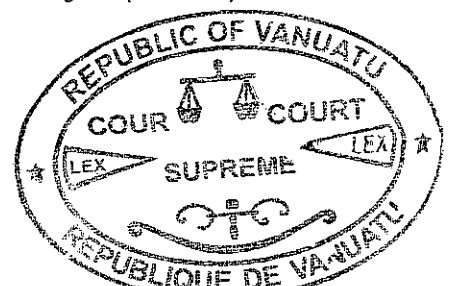
16. The essential characteristics of an easement are:³
- (1) there must be a dominant and servient tenement.
 - (2) The easement must accommodate the dominant tenement.
 - (3) The dominant and servient owners must be different persons.
 - (4) The easement must be capable of forming the subject matter of a grant.
17. 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.
18. A legal easement is an easement capable of subsisting at law which has been validly created at law, namely by statute, deed or prescription.⁴ The grant of an easement for a legal estate must be by deed. The nature and extent of an easement created by express grant primarily depend on the wording of the instrument.⁵
19. An easement can also be created by an implied grant or reservation⁶ or under the doctrine of prescription- resting on the fact of long enjoyment of the right constituting the easement.
20. An "easement" is 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".
21. Part 10 of the Land Leases Act deals with the creation, release, extinguishment and modification of easements.
22. 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.

³ *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 163, [1955] 3 All ER 667 at 673.

⁴ *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 163, [1955] 3 All ER 667 at 673. See also, Megarry and Wade, *The law of real property*, 6th edition at 18-090

⁵ See for example, *Alford v Hannaford* [2011] EWCA Civ 1099

⁶ The rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, CA. See also *Halsbury's Laws of England* (5th edition) at paragraph 792.



23. 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.
24. As per s 67(4), the grant or reservation of an easement shall be completed by its registration as an encumbrance in the register of the lease burdened and in the property section of the register of the lease which benefits and by filing the instrument.

Rights of way

25. 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”.

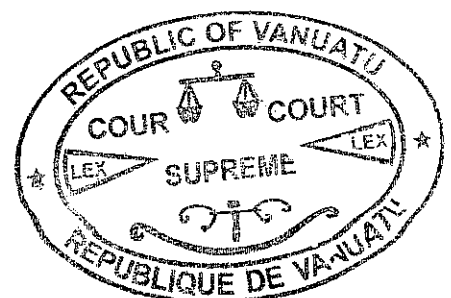
26. A private right of way may be defined as a right to use the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement. If a right of way is claimed under an express grant, the nature and extent of the right depends on the proper construction of the instrument creating it. A right of way may arise by implication of law, where both dominant and servient tenements have been in the common ownership of one person and that person has disposed of one or other of the tenements. Rights of way arising in this manner are either rights of way reasonably necessary for the comfortable occupation of the dominant tenement or rights of way of necessity⁷

Submissions

Claimant’s submissions

26. Mr Willie made oral submissions because he failed to comply with the directions to file written submissions made on 3 July 2024 and 16 October 2024. In such circumstances, he was not given more time to file written submissions, as requested.
27. Mr Willie relied in part on the submissions filed in support of the summary judgment application and made additional submissions orally.

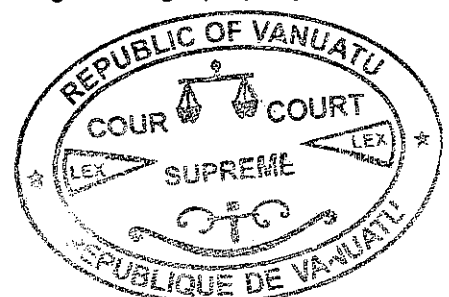
⁷ See Halsbury’s Laws of England (Fifth edition), paras 792 and 884



28. Mr Willie submits that the servitude on the Second Defendant's title is a right of way for the benefit of the Claimant's title. He acknowledges that there is no evidence of an instrument creating the easement but submitted that the Court should rely on various strands of circumstantial evidence to infer that the servitude is a right of way for access to the Claimant's property:
- a. The fact that the easement is shown or recorded on the Second Defendant's title infers that it had been registered, having regard to s67(4) of the Land Leases Act.
 - b. Both Mr Ngwango and Sandra Joses confirm that the right of way is an access into the Claimant's land.
 - c. That the servitude is shown on the sketch plan relating to the Claimant's title shows it was intended to be used for access by the Claimant. Otherwise, it would not be shown on the sketch map.
 - d. There is a gate over the 4-metre servitude area which shows it is meant for access.
 - e. The hypothesis that the servitude is for underground cables has been discredited by the evidence of the VUI manage
 - f. Even without the instrument, the circumstances are that the servitude can only have been for access to the Claimant's land.
 - g. Under s17(a) of the Land Leases Act, one of the overriding interests is rights of way.

Submissions for First and Second Defendants

29. Mr Malcom relies on the submissions filed for the summary judgment hearing.
30. 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. This is unknown because the Claimant has not provided it.
31. The First and Second Defendants do not accept the opinion given by Mr Ngwango 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.

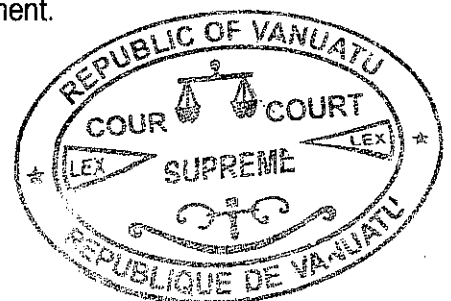
32. Mr Malcolm submits that there are various reasons for a servitude/right of way, including for the purposes of utilities such as water and electricity type utilities, not only access. Mr Malcom submits that pre independence there appears to be no reason for a servitude or right of way between the 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.
33. Mr Malcolm submits that there are 6 matters required to be proved to establish an easement in favour of the Claimant:
 - (1) The deed or grant establishing the easement.
 - (2) The date it originated.
 - (3) The expiry date (if any).
 - (4) The parties to the easement.
 - (5) The intent or benefit it granted.
 - (6) The area to be utilized -underground, at ground level, air or all or some.

Method of trial

34. At the outset of the trial, counsel advised that they waived the right to cross examine the witnesses. So, the trial proceeded on the basis of submissions. While there was a dispute about Mr Ngwango and Mrs Joses' evidence that the servitude is a right of way for the Claimant's benefit, that issue did not require cross examination. Rather, it is a matter of the weight to be given to their evidence.

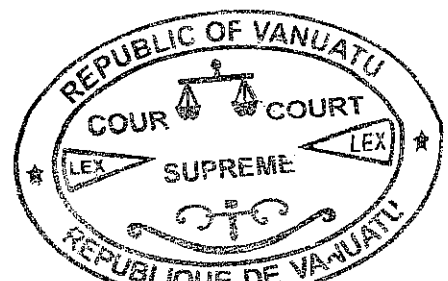
Discussion

35. By way of background, both the Claimant's lease title 03/0184/002 and the Second Defendant's lease title 03/0184/021 were initially owned by Kai Kwai Fung. On 5 July 2007, Mr Fung transferred lease title 03/0184/021 to the Second Defendant. On 11 August 2022, lease title 03/0184/002 was transferred to the Claimant. On the plan of lease title 03/0184/021, a 4-metre-wide servitude is shown at the rear of the Second Defendant's property. Notably, there is no reference to the servitude in the register of either lease title. I discuss this in more detail later in the judgment.



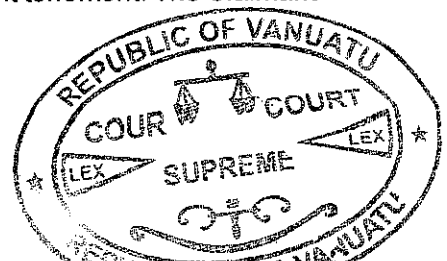
36. The properties are adjacent to each other. Both front the road. The Second Defendant's lease title is on a corner site. From the title plans and the photograph annexed to Mr Lal's sworn statement filed on 6 March 2024, the property borders the road on two sides, the Claimant's property and a property on the rear boundary.
37. According to his evidence, the Claimant started to construct a building on his property in 2018 and accessed his property from a property on the left-hand side until the owner locked the property. So, he asserts that his only access is via the right of way created through lease title 03/0184/021. The Claimant's belief that the servitude is a right of way benefitting his property appears to have arisen when he could no longer access his property from the property to the left of lease title 03/0184/002.
38. It is not correct to say that Mr Tang's only access to his property is via a neighbouring property. His property has a road frontage. It was his choice to build in a manner that might create access issues onto the property.
39. As noted, it is not in dispute that there is no evidence of a deed or instrument creating the 4m servitude shown on lease title 03/0184/021. The evidence relied upon by the Claimant to support the asserted right of way to his property is the plan for lease title 03/0184/021 showing the servitude, the evidence of Mrs Sandra Joses and Mr Ngwango and the fact that there is a gate between the two properties "over" the servitude area.
40. Annexed to Mr Tang's sworn statement filed on 19 April 2024 is a letter dated 18 April 2024 authored by Sandra Joses. The letter says that the Land Survey Office Santo confirms that the servitude in lease title 03/0184/021 is a 4 m right of way accessing lease title 03/0184/002. I place no weight on the letter for three reasons. First, it is a hearsay statement⁸ unable to be tested. Second, Mrs Joses provides no information as to how she reached formed the view that the servitude was a right of way for the benefit of the Claimant's title. This was all the more important given that there is no instrument held by the Department of Lands creating the servitude, and the servitude is not shown in the lease register of either title. Third, Mrs Joses is purporting to give opinion evidence, but without establishing that she has the suitable experience and qualifications to do so.
41. Mr Ngwango filed two sworn statements in support of the claim. He asserts that the servitude shown on lease title 03/0184/021 is a right of way and was created to access lease title 03/0184/002. As such, the Claimant has an overriding interest to use the right of way under s 17(a) of the Land Leases Act. As with Mrs Joses evidence, I place no weight on Mr Ngwango's evidence about the creation and purpose of the servitude for three reasons. First, Mr Ngwango provides no basis for his opinion that the servitude was created to access the Claimant's title. Second, he does not disclose what steps if

⁸ A hearsay statement is a statement made by a person who is not a witness and tendered to prove the truth of its contents.



any, he took to establish how the servitude was created, or its purpose. Third, Mr Ngwango purports to give opinion evidence, but without establishing that he has the suitable experience and qualifications to do so.

42. The Claimant did not address in the claim how he asserts the servitude was created as a right of way for the benefit of his property. There is a lack of evidence as to the creation of the servitude. There is no evidence before the court that it was granted by statute. It must be then by agreement or grant, express or implied. I accept that while a legal estate must be created by deed, that there can be an implied grant or reservation.
43. There is no evidence at all that there is an agreement or deed which created the servitude. It is not in dispute that a servitude is shown on the plan for lease title 03/0184/021. There is no other record of a servitude on either lease title, however. Pursuant to s 67(4) of the Land Leases Act, the grant or reservation of an easement is completed by its registration as an encumbrance in the register of the lease burdened and in the property section of the register of the lease which benefits. In this case, the grant of the servitude is not shown as an encumbrance in the register of the lease burdened, which is lease title 03/0184/021. Nor is it shown in the property section of the register of the lease which benefits, which is lease title 03/0184/002. So, the registers of both lease titles provide no assistance in determining how the servitude was created and its purpose. All that can be said is that the 4 m servitude is shown on the plan for lease title 03/0184/021. The bare fact that the servitude is shown on the sketch plan does not prove that a right of way was created for the benefit of the Claimant's title, or its nature and purpose.
44. There is no evidence to establish an implied reservation or grant of a right of way to benefit lease title 03/0184/002. Of note is the fact that until lease title 03/0184/021 was sold to the Second Defendant in 2007, the same person, Mr Fung, was the registered proprietor of both lease titles. So, there would be no need for a right of way as he had unimpeded access. It cannot have been the case that a right of way was reserved to lease title 03/0184/002 upon the sale and transfer of lease title 03/0184/021 from Mr Fung to the Second Defendant in 2007 because the survey plan showing the 4 m servitude is dated 24 October 1985. Further, there is no need for a right of way over lease title 03/0184/021, given that lease title 03/0184/002 fronts the road so there is access from the road to the property. It cannot realistically be suggested either that there is a presumed grant, as there is no evidence of the servitude having previously been used as a general right of way by Mr Fung, the previous registered proprietor, or by the Claimant. It was for the Claimant to put evidence before the Court to establish the creation and characteristics of the servitude as a right of way for the benefit of accessing his lease title.
45. The evidence does not establish the essential characteristics of the servitude either. In terms of the essential characteristics, there is a servient tenement, lease title 03/0184/021. That is the title burdened by the servitude. There must also be a dominant tenement. There is no evidence as to which title is the dominant tenement. The Claimant



asserts that it is lease title 03/0184/022, but without anything to support that assertion, other than the existence of the gate between the two properties. But there is no evidence about the gate, when it was installed and its purpose. The Claimant's property is not the only property bordering the Second Defendant's title. The servitude runs along the rear boundary of lease title 03/0184/021. There is another property bordering the rear boundary of the Second Defendant's property.

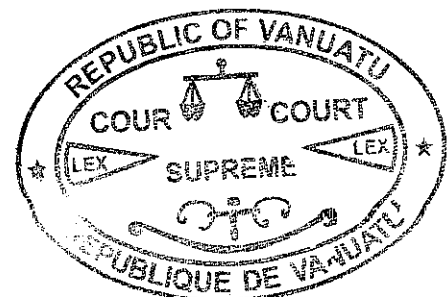
46. Another essential characteristic is that the dominant and servient owners must be different persons. The evidence does not address that point. As noted, the title plan is dated 24 October 1985, which appears to predate Mr Fung's leases which were registered on 5 May 1986 and 12 September 1986. The lessor of both titles is recorded as the Luganville Urban Land Corporation, so on the face of it, the servitude could not have been a right of way for the benefit of lease title 03/0184/002 because in 1985 (the date of the survey plan) the lessor of both titles was the same entity or person. That holds true even if the survey plan was not registered until after the lease titles were transferred to Mr Fung, as lessee. That tells against the servitude being a right of way for the benefit of the Claimant's property, as until 2007 both the lessor and lessee were the same person.
47. The Claimant has not proved that it is more likely than not that the servitude was created or used as a right of way for the benefit of lease title 03/0184/002 for the reasons set out above. There is no evidence as to how the servitude was created, and insufficient evidence as to the essential characteristics and purpose of the servitude as a right of way over the Second Defendant's property for the Claimant to access his property.

Overriding interests

48. The Claimant did not plead how the right of way gives him an overriding interest under s 17(a) of the Land Leases Act. Nor did Mr Willie provide any authority for how the right of way gives the Claimant an overriding interest, in this case.
49. According to Gale on Easements,⁹ registered land is subject to "*overriding interests*", that is, those interests which are enforceable against a proprietor of registered land even though they do not appear on the register. They include rights of way. Legal easements will bind registered land although not protected by entry on the register.
50. It is unnecessary to consider overriding interests in terms of s 17(a). That is because the Claimant has not established that the servitude was a right of way for the benefit of his property, which would have been an equitable entitlement, because a right of way is not registered on the title. Even if he had, there is no evidence that the Claimant (or the prior registered proprietor) exercised a right to access the Claimant's property via the Second Defendant's property.¹⁰

⁹ *Seventeenth Edition*

¹⁰ See *Celsteel Ltd v Alton House Ltd* [1985] 1 WLR 204



Result

51. The claim fails as the Claimant has not proved on the balance of probabilities that the servitude shown on the plan of lease title 03/0184/021 is a right of way for the benefit of lease title 03/0184/002, for the reasons set out above. The claim is dismissed.
52. There is an order for costs in favour of the First and Second Defendants as agreed or taxed.

**DATED at Port Vila this 15th day of November 2024
BY THE COURT**

