

BETWEEN: **RENE LAURENT**
Appellant

AND: **FAMILY FARM DEVELOPMENTS LIMITED**
Respondent

Coram: *Hon. Justice Bruce Robertson*
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: *Mr Robert Sugden and Mrs Marie Noelle Ferrieux-Patterson for the Appellant*
Mr Nigel Morrison for the Respondent

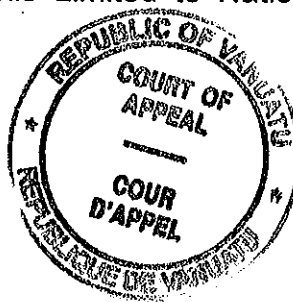
Date of hearing: *16th October 2012*

Date of judgment: *25th October 2012*

JUDGMENT

THE BACKGROUND FACTS

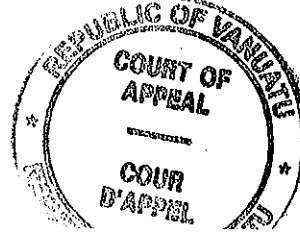
1. As the trial judge said at the start of his judgment, the ultimate issue at trial was whether the appellant René Laurent (RL) or the respondent Family Farm Developments Ltd (FFD) should be entitled to a lease title No.12/0631/001 (the Lease). The Lease had been registered in the name of RL on 1 December 2009.
2. The lease was granted initially for 30 years, and was due to expire in 2010. Shortly before it expired, its term was extended to 75 years.
3. Before the present issue arose, the lease had been transferred to Société Civile Familiale Nicholls in 1983, which changed its name in 2002 to Nicholls Limited. In 2003, the Lease was mortgaged by Nicholls Limited to National Bank of Vanuatu (NBV) to secure a substantial loan.



4. The problem arose that two contracts for the sale and purchase of the Lease were executed about the same time:
 - (1) On 12 November 2009, a sale and purchase agreement between Nicholls Limited and FFL for VT27,000,000;
 - (2) On 22 November 2009, a sale and purchase agreement between Claude Nicholls representing La Société Civile Familiale Nicholls and RL for VT30,000,000.
5. On 26 November 2009, a transfer of the lease to RL was signed by Claude Nicholls on behalf of the transferor, but the Company seal of Nicholls Holdings was not then affixed to the transfer.
6. On 1 December 2009, that transfer to RL was registered in the Lands Records Office.
7. On 31 December 2009, FFD lodged a caution over the Lease in the Lands Records Office.
8. On 8 February 2010, the Board of Nicholls Limited met and resolved to ratify the agreement with RL, and to affix its seal to the agreement.
9. Apparently, after some correspondence with the Director of Lands, the Director withdrew the caution on the Lease which had been lodged on 31 December 2009.
10. Matters stood like that for some months, apart from correspondence between the parties. On 23 July 2010, FFD brought its claim in the Supreme Court which led to the judgment appealed from. Before its claim was heard, Nicholls Limited was struck off the Register of Companies on 1 October 2010.

THE SUPREME COURT CLAIM

11. FFD's claim in the Supreme Court was that RL "fraudulently procured" the transfer of the Lease to RL. The particulars given were as follows:
 - "(a) *The 1st Defendant knew that Société Familiale Nicholls, the named*



transferor on the Laurent transfer was not a legal entity.

(b) The 1st Defendant knew that any purported transfer from Société Familiale Nicholls was of no legal effect.

(c) The 1st Defendant knew that Société Familiale Nicholls, was not the registered proprietor of the lease.

(d) Notwithstanding (a), (b), (c) and (d) the 1st Defendant knew that there was a mortgage over the lease which the registration of the transfer of lease without the consent of the mortgagee.

(e) The Mortgagee's consent to the transfer of the lease was not obtained.

(f) Notwithstanding (a) — (e), the 1st Defendant proceeded to seek and obtain the registration of the Laurent transfer.”

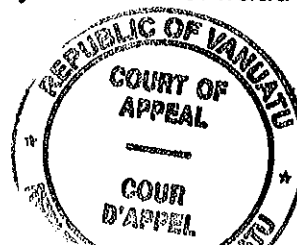
12. It was also alleged that that transfer was not executed by Claude Nicholls with the approval of Nicholls Limited, and “is a forgery”.
13. The balance of the allegations in the Amended Statement of Claim concern whether the Director of Lands should have registered the transfer to RL without the consent of NBV as mortgagee, and (allegedly) knowing that the transfer was procured fraudulently or by mistake, and (allegedly) knowing of the FFD claims about Nicholls Limited not having approved the transfer.
14. FFD also asserted that it was eligible to be registered as transferee of the Lease. By 7 April 2010 it had received the consent of Mele Trustees Limited and Pierre Nikara as representative of the Nikara Family, and on 6 May 2010 FFD paid Nicholls Limited its agreed price for the transfer of the lease, and received from Nicholls Limited a signed transfer of Lease, with the consents it referred to. By then, of course, the transfer of the Lease to RL had been registered and the caution lodged by FFD on the Register of Lands had been removed.
15. FFD claimed an order that the registration of the transfer of the Lease to RL be cancelled, that the Director of Lands Records make that cancellation, and for damages and costs against RL.



16. Rectification of the Register of lands may be ordered by the Supreme Court under s.100(1) of the Land Leases Act where it is satisfied that the registration was “obtained, made or omitted by fraud or mistake”, and s.100(2) protects the registered proprietor in any event – in this case RL – unless the registered proprietor had “knowledge of the omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

THE JUGDMENT APPEALED FROM

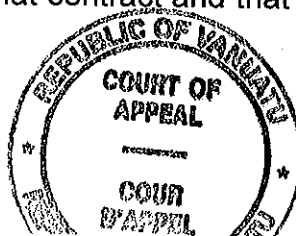
17. The trial judge, in his reasons, made a number of findings and conclusions about the FFD claims which were adverse to it. They are not the subject of any cross-appeal or cross contention by FFD. So it is convenient simply to note them.
18. The trial judge found the transfer of the Lease to RL:
- (1) is not a forgery;
 - (2) is properly executed, despite the use of the name Société Familiale Nicholls rather than Nicholls Limited;
 - (3) is valid, although the Board of Nicholls Limited had not by then formally resolved to affix the Company seal to it.
19. He also observed about the allegations of mistake and the particulars quoted above that each of them concerned times after the registration of the transfer of the Lease to RL. In effect, the claim based upon mistake also failed.
20. The fraud allegations required careful consideration of the evidence. The trial judge referred to it in some detail.
21. It will be necessary to refer to some of that evidence in a little detail. Counsel for RL perceived at an early point in the hearing that FFD was seeking to make out a claim of fraud on the basis of Claude Nicholls having been coerced to signing the contract with RL and the transfer to RL. That prospect had been obliquely raised when FFD, as one of its witness statements, had filed a sworn witness statement of Geoffrey Gee. The only other sworn witness statement of FFD was from a principal of FFD. It did not contain any evidence of fraud by coercion.



22. The pleaded fraud was that RL knew of the defects in the execution of the transfer and its registration. As noted above, those alleged defects were not made out, so there was no fraud in that respect shown.
23. Although the pleaded case failed, the trial judge nevertheless proceeded to consider a claim of fraud by coercion.
24. The trial judge ultimately found that the transfer to RL was executed by Claude Nicholls under the influence of improper pressure knowingly exerted by RL "his agents and advisers" and was therefore registered "by fraud".
25. The only point that FFD succeeded on was fraud by coercion.
26. That is the finding which is challenged on the appeal.

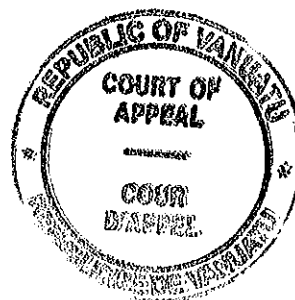
THE PROCESS LEADING TO THE FINDING OF COERCION

27. First the pleadings.
28. The trial judge said at [9] of his reasons that there was no pleaded allegation that the transfer to RL was procured by any duress or coercion on Claude Nicholls, or the contract to transfer the Lease to RL entered into a few days before.
29. RL had successfully sought from FFD better particulars of its allegation of fraud on his part. That application had led to the Amended Statement of Claim containing relevantly the particulars set out above. Subsequently, FFD filed the Claimant's Facts and Issues. It asserted that the transfer of the Lease to RL was "fraudulently procured", but the detailed particulars of the fraud related to the fact that the transfer was signed by Société Familiale Nicholls and that the consent of NBV was not given to the registration of the transfer.
30. In neither document did FFD allege clearly that RL applied any particular pressure to Claude Nicholls to get him to sign that transfer (or the contract of 22 November 2009) or that any acts involving pressure on his part amount to duress of a character sufficient to set aside that contract and that transfer of the

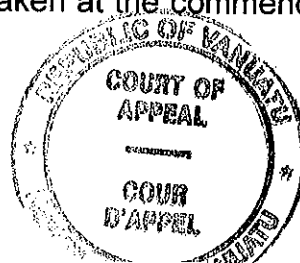


Lease. The “fraud” was said to be comprised by RL knowing of the alleged defects in the execution of the transfer and in its registration.

31. As noted above, the trial judge rejected each of those allegations made by FFD. There is no cross-appeal or cross-contention by FFD on this appeal, so the Court of Appeal proceeded on the basis that those rulings by the trial judge were correct.
32. The first indication of such a case being presented by FFD emerged from the sworn statement of Geoffrey Gee. The important extracts from his statement are set out in the trial judge’s reasons at [40]. That statement, on the topic of coercion, is largely inadmissible. It expresses conclusions that Claude Nicholls had “been coerced into these proceedings”, and that “I understand from him that he was under pressure”. It denies any undue pressure brought to bear on Claude Nicholls by him or his firm. Rule 1.4(2) of the Civil Procedure Rules directs that a sworn statement should not contain material that would not be admitted in evidence.
33. In addition, the claim by FFD was no doubt focused on the perceived need to enliven s.100 of the Land Leases Act (referring to fraud or mistake) before the Court could order correction of the Register of Lands. There was no separate claim by FFD against RL based upon FFD having the earlier contract of 12 November 2009; that is, earlier than the contract of 22 November 2009 with RL or against the vendor. So the Court of Appeal does not need to consider any such issues.
34. Based on the filed sworn statements of FFD, that evidence was the only evidence it propose to adduce to prove coercion. RL filed a number of sworn witness statements, including from Claude Nicholls, Melisa Nicholls his wife, Yan Nicholls his brother and Marina Nicholls his sister. The witness statements also included sworn statements from RL, Jenny Tari and James Tari a legal practitioner acting for Pastor Nikara in respect of his contract to the transfer of the Lease to RL.



35. Not surprisingly, none of those witness statements dealt with the issue of duress or coercion. That is because it had not been pleaded or particularised as a case RL had to meet. It was not an issue then, although loosely speaking it emerged as an issue in the course of the hearing. None of Melisa Nicholls, Yan Nicholls, Marina Nicholls or any other witness who may have had contact with Claude Nicholls around the time when he signed either the contract with RL or the transfer to RL in November 2009 was questioned about the circumstances in which he did so.
36. During the hearing, Counsel for RL also sought to rely on the sworn statements of RL, Claude Nicholls and Jenny Tari. Counsel for RL indicated that they were not available at the time, and did not pursue the suggestion of the trial judge that he seek an adjournment for them to give evidence. However, he elected to close the case for RL. The trial judge gave that evidence effectively no weight. No complaint is made about that. But the failure to produce them for cross-examination was criticised by the trial judge.
37. Counsel for RL had earlier decided not to cross-examine Geoffrey Gee. The trial judge had not then indicated whether all or any of Geoffrey Gee's sworn statement should be rejected as inadmissible. It was clearly not admissible in part. It related to an unpleaded issue. Cross-examination in such circumstances can be unfair: Counsel did not know clearly the case RL had to meet. For instance, in the course of submissions before the Court of Appeal, counsel for FFD identified both RL and a legal practitioner as having applied improper pressure to Claude Nicholls to sign the contract with RL and the transfer to RL, but that had not previously been identified. The trial judge also found coercion in very wide terms by RL his agents and advisors, but made no findings about what coercion was.
38. Secondly, counsel for RL objected to much of the evidence of FFD, in particular much of the contents of the sworn statement of Geoffrey Gee that related to coercion. He had acted for the Nicholls Family for many years and had been a director of Nicholls Limited until 1 October 2002. The trial judge did not determine those objections when they were taken at the commencement of the



hearing, but left the contested evidence “for counsel to test in cross-examination and then later to make submissions as to the effect and weight of the evidence.”

39. In a complex case, that is often an efficient way to deal with sworn statements where there is a dispute about the admissibility of part of their contents. However, in this instance that course of action proved to be inappropriate. It led to one of the grounds of appeal on the only issue on which FFD succeeded, at trial. That is the issue of “coercion”. It is clear that the sworn statement of Geoffrey Gee contained material relevant to that issue, but in an inadmissible form. That material was relied upon by the trial judge to support his finding that Claude Nicholls had been coerced by RL when Claude Nicholls signed the transfer of the Lease to RL.
40. The reasons of the trial judge are best identified from [71] to [73] and [77] of his reasons. They are as follows:

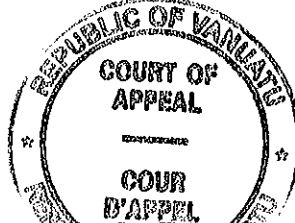
“In my view, it is disingenuous to suggest that the Laurent transfer was not being challenged. It might be that the claim could have been better expressed or particularized as to the precise nature of the challenge for fraud, but there can be no doubting that the legal status of Société Civile Familiale Nicholls (the named transferor of the Laurent transfer) and the signing of the transfer by Claude Nicholls was always at the forefront of the claimant’s challenge.

From the very early stages of this action every attempt was made by the first defendant to isolate and insulate Claude Nicholls from the principals of the claimant company on the basis of his concerns about the fragile state of Claude’s health and an allegation that he was under pressure to retract his sworn statement in support of the first defendant. This desire to insulate Claude Nicholls was continued at the trial and effectively denied the Court the opportunity of seeing and hearing Claude Nicholls under the pressure of cross-examination.

*Similarly, through a deliberate tactical choice of counsel for the first defendant, he too, was not called for cross-examination not only as to the circumstances surrounding the execution of the Laurent transfer by Claude Nicholls but also as to true state of his knowledge of important and material facts concerning the status of Société Civile Familiale Nicholls and the undischarged outstanding mortgage of **NBV** on the lease title that was being transferred to him. Most crucially, the evidence of **Geoffrey Gee** remained uncontradicted.*

...

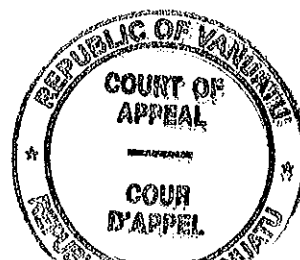
*The failure of defence counsel to cross-examine **Geoffrey Gee** disables me from rejecting his evidence, and, the deliberate failure to tender the first*



defendant and Claude Nicholls for cross-examination undermines their sworn statements (evidence in chief) and leads me to the unfavourable conclusion that defence counsel feared to call them for cross-examination because to do so would have been detrimental to the first defendant's case which depended entirely on the authenticity and voluntariness of the Laurent transfer."

CONSIDERATION

41. The trial judge correctly said that a contract or transfer procured by coercion or threats of coercion may cover overt acts of improper pressure or coercion such as unlawful threats. That, presumably, is the sort of case that FFD was trying to present. There was no suggestion that there was a particular relationship of dependency between RL and Claude Nicholls so that by reason of the relationship, RL had undue influence over Claude Nicholls.
42. The onus of proof of coercion clearly rested on FFD. It could have called Claude Nicholls itself. He was available to be called by either side as a witness. It could have called the person (we were told, a bank officer) who witnessed the signature of Claude Nicholls on the transfer. It could have called, or cross-examined, the other members of the Nicholls family who gave evidence when called on behalf of RL. It did none of those things. Instead, it tried to discharge the onus of proof by relying on a sworn statement of Geoffrey Gee.
43. In our view, in the particular circumstances of this matter, the trial judge erred in a way which requires the judgment and orders to be set aside.
44. There was no allegation of fraud by coercion in the pleadings. The allegation of fraud by LR was particularised. That allegation did not allege fraud by coercion. It is not enough to have raised that claim by the statement of Geoffrey Gee. The exchanged Statements of Facts and Issues did not advert to it. There was no pre-trial notification of the issue. FFD did not do so, even though the sworn statement of Geoffrey Gee was dated about a month before the Statement of Facts and Issues was filed by FFD.
45. In a case where fraud is alleged, it is especially important that the allegation be clearly made and the conduct said to constitute the fraud identified. That is to

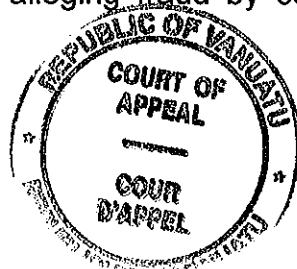


ensure a fair trial. See generally **Roqara v. Takau** [2001] VUCA 15 at pp5-6; **Smith v. Chadwick** [1882] 20 Ch D 27; [1884] 9 App Cas 187.

46. Even if the issue of fraud by coercion had been identified clearly, so RL could not complain that he was taken by surprise, RL was entitled to know who had applied the coercion and what its nature was. That is shown by the comment (noted above) by counsel for FFD during the appeal hearing that RL and one of his legal representatives applied the coercion. How was RL to prepare his case, if he did not know one of his legal representatives was one of the persons engaging in the alleged coercion? How could he know who to take statements from if he was not told who had engaged in that conduct? In this case, if that allegation had been properly made, it may have been that the legal firm acting for RL could no longer continued to do so. The lack of any allegation led the trial judge to make serious adverse findings against RL and his “agents and advisors”. That very general finding also shows why it was unfair to RL to entertain the claim on the state of the pleadings.
47. When, at the commencement of the hearing, counsel for RL objected to parts of the statement of Geoffrey Gee, he did so on two grounds: that the comments about coercion were inadmissible in form, and because they were irrelevant. Both of those objections showed have been upheld. Parts of the statement were inadmissible hearsay, as Geoffrey Gee had not seen Claude Nicholls at about the time the RL contract and transfer were signed, and he could give no direct evidence about what, if any, pressure was applied to Claude Nicholls at that time. He could perhaps have given some evidence of Claude Nicholls’ health and practice when signing documents, but he could not then draw the conclusion or make the assertion that Claude Nicholls had improper pressure applied to him when he signed those documents. He could not say what Claude Nicholls had told him about the circumstances in which he signed those documents. Moreover, because the issue of fraud by coercion had not properly been raised and detailed, evidence on that topic should have been treated as irrelevant unless it was also relevant to another issue.



48. At the point of closing the case of FFD, counsel for RL was left with an unfair and difficult decision. He did not know what part of Geoffrey Gee's evidence had been or would be received. He should not have been expected to cross-examine on hearsay evidence. How could he properly do so, in RL's interests? The risk would be to provoke and bring out more hearsay evidence. In those circumstances, he elected to ask no questions of Geoffrey Gee. That was a course of action reasonably available. It is not a matter which should have been treated as lending more weight to Geoffrey Gee's sworn statement, or should have supported the adverse conclusion which the trial judge drew from it.
49. Nor, in the circumstances, was the decision not to call RL or Claude Nicholls a matter which should have drawn adverse comment from the trial judge. The fact is that, without their evidence (that is, because the trial judge correctly placed no weight on it), FFD failed to prove the case it had pleaded. RL was not obliged to present witnesses who had provided statements on the issues as pleaded, to be cross-examined on the issue of coercion to see what came out.
50. The best evidence of any coercion, as noted above, would have been the evidence of Claude Nicholls. He could explain why he signed two contracts for the lease of the same property with FFD and RL within a short space of time. He was equally available to FFD to provide a sworn statement. Evidence could have been obtained from others directly involved in the preparation and signing of the contract and lease to RL. There may have been other admissible evidence on the topic.
51. However, FFD chose not to plead a case of coercion and it did not present any cogent and admissible evidence to make out that case.
52. For the reasons given, in our view, the appeal must be allowed and the orders of the trial judge set aside.
53. We do not propose to remit the matter for rehearing. The pleaded case failed. The appeal succeeds as the trial judge found in favour of FFD on a non-pleaded case and on a basis which we have found was flawed. It is a matter for FFD whether it may bring a separate claim alleging fraud by coercion, duly




particularised, recognising that such a claim should not be made without firm evidence in support of it and that there are other real obstacles to it being able to do so.

54. Consequently we order that the claim by FFD in the Supreme Court is dismissed. It did not succeed on any of its pleaded points, and has not complained of those findings by the trial judge.
55. In those circumstances FFD should pay RL the costs of the appeal, and FFD should pay to RL the costs of the action in the Supreme Court action. The other parties in the Supreme Court action did not participate on the appeal. The only other costs order made in the Supreme Court was that the third defendant Pastor Pierre Nikara as representative of Nikara Family pay 10% of the costs of FFD in that action. That order is also discharged.
56. The formal orders are:
 - (1) Appeal allowed.
 - (2) Orders of Supreme Court made in Civil Case 102 of 2010 on 3 September 2012 are discharged and instead of those orders the claim by Family Farm Development Limited against René Laurent and others is dismissed. Family Farm Development Limited is to pay to René Laurent his costs of that proceeding. The order that Pastor Pierre Nikara as representative of Family Nikara pay 10% of the costs of Family Farm Development Limited is also discharged.
 - (3) Family Farm Development Limited pay to René Laurent his costs of the appeal.

DATED at Port-Vila this 25th day of October 2012

ON BEHALF OF THE COURT



John MANSFIELD
Judge

