

(Civil Jurisdiction)

BETWEEN: SERGIO THOMAS

Claimant

AND: RENE DELAVEAU & PATRICE DELAVEAU

Defendants

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mrs Marisan P. Vire for the Claimant
Mr Silas C. Hakwa for the Defendants

Dates of Hearing: 5th and 6th, 28th and 29th June 2012
Date of Judgment: 29th June 2012

JUDGMENT

1. This judgment provides reasons for the oral decision handed down on 29th June 2012. On that date the Court heard Counsel's summing up of evidence and submissions both written and orally by Mrs Vire, and orally only by Mr Hakwa. The Court in handing down its oral decision dismissed the Claimant's claims in its entirety, and awarded costs of and incidental to the proceeding against the Claimant in favour of the defendants on the standard basis, as agreed or determined by the Court.
2. The Claimant filed his claims on 7th February 2011 and an Amended Claim on 15th March 2011 claiming the following reliefs –
 - (a) That an object suspected as a gold substance be returned to the claimant and a declaration that the claimant is rightful owner.



(b) Alternatively, that the value of the metal be assessed and paid to the claimant.

(c) Damages for stress to be assessed.

(d) Costs.

3. Among others the Claimant asserts in the main that –

(a) Sometimes in 1995 his family had discovered a plane floater between the Beach Front Resort and College de Santo.

(b) Amongst the debris found was a metallic object, grey in colour weighing about 10 kg the subject of this proceeding.

(c) The claimant's family was living at Red Corner Area at the time but later moved to Radio Station Area.

(d) During this period, the claimant's mother was using the metallic object as an anchor for her canoe whilst fishing, for mat weaving as support and for other domestic purposes.

(e) Sometime in December 2012, a police officer, Eric Bob who frequently visited the family saw the metallic object and attempted to slice a piece of it to determine whether it was lead. Discovering, it was not lead but some kind of iron with value, he took it to his home and cleaned it up with intention of selling it in order to earn some money to facilitate the claimant's ailing mother to travel to the hospital in Port Vila to receive treatment. During this process, Mr Bob discovered the metallic object was gold.

(f) Upon this discovery the claimant, his family and Mr Bob agreed to fabricate a story that it was he who found the metallic object while



diving, in order to divert the attention of the defendants for security purposes.

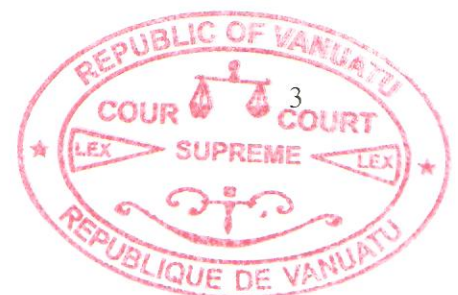
(g) This story was leaked out and a member of the defendant's family went into Mr Bob's home to see the metallic object. A photograph of it was taken and shown to the defendants who identified it as the metallic object that used to be at their family home at Radio Station Area since 1991.

(h) The claimant organized a meeting on 20th January 2011 to try and sort their differences over the metallic object and to come to some common understanding for the sale of the object for the common benefit of everyone. At this meeting the claimant asserts he was threatened by the defendants therefore he handed over the metallic object to them.

(i) The defendants are now in the possession of the metallic object and he seeks orders for its return.

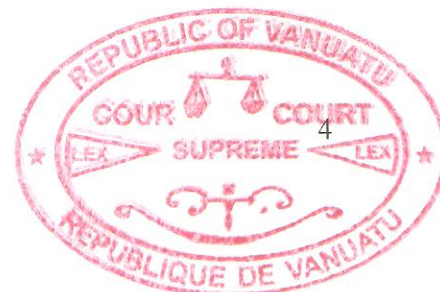
4. The defendants filed a Defence and Counter-Claims on 1st April 2011. They deny it was the claimant's family who found the metallic object in 1995. They assert the object was found by Jean Claude Delaveau in 1991 and it has been in exclusive custody and/or possession since that date until sometimes in 2004 when they allege the object was removed by a member of the claimant's family. They assert the object belongs to the defendants' family. They assert the claimant and his witnesses had committed perjury by making sworn statements they knew were false and conspiring to tell lies about how the metal was found by Mr Bob.

5. The defendants seek the following reliefs in their Counter-Claims –



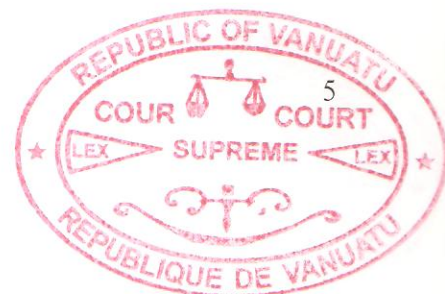
- (a) That the claims of the claimant be dismissed in its entirety.
 - (b) A declaration that the object is owned by the Delaveau Family.
 - (c) That the claimant and members of his family be restrained from intervening in any way with the members of the defendants' family in relation to the object.
 - (d) Costs of and incidental to the action.
6. In Civil Cases, it is the general rule of evidence that he who asserts a fact has the burden of proof on the balance of probabilities. In this case, the claimant has that duty in the main claim. This burden shifts to the defendants on their counter-claims.
7. The claimant gave evidence by sworn statements upon which he was cross-examined by Defence Counsel. He produced evidence from three other witnesses namely Eric Bob, Marie Stella Malsungai and Bob Seley. Each of them were cross-examined by Mr Hakwa.
8. The defendants gave evidence themselves by sworn statements upon which they were cross-examined at length by Mrs Vire. They produced evidence from eight other witnesses namely Jean Claude Delaveau, Owen Bangtor, Tarihile, William Nixon Virakiki, Camille Young, Canold Philip, Sallyn Lopez and Flaviana Bebe.
9. Counsel for the claimants raised two issues for the Court –
- (a) Whether the claimant had possession since 1995?; and
 - (b) Whether the defendants had possession of the object in 1991?

In deciding those issues, it must first be decided from the evidence as to who found the metallic object.



10. The Court examines the evidence first of the claimant and concludes that it is insufficient to show that it was the claimant's family who found the metallic object for the following observations and reasons –

- (i) The claimant relies largely on his and Eric Bob's evidence. However, the Court finds both their evidence are unreliable and not credible because they conspired to tell another story that it was Eric Bob who found the metal while diving, when they knew full well this was a blatant lie. They both admitted this in open Court. As such, it is unsafe to rely on evidence of witnesses who are prepared to tell a story at a certain place and time and to tell a contradiction one at another time and place.
- (ii) The claimant said it was his mother who found the metal but his mother Marie Louise Thomas, although she deposed to a sworn statement, due to her passing, her statement is not part of the claimant's evidence. But even if she was alive and given evidence, her statement tells us nothing about her finding the metallic object.
- (iii) The claimant said in his evidence that he and his family found the object. He said Mrs Titus, Eliane, Sergine, Daniel, Danitza, Tatiana and Claudette were present. Yet none of these (except Mrs Titus) gave any evidence to confirm the claimant's assertion. The claimant also said Joseph Malsungai, Herman, Severion and Amosio were present at the time. However, none of these gave any evidence to confirm the claimant's assertions. He also said Virakiki and Tari Hiley were present. However, these two persons gave evidence for the defendants accepting they found a floater but not a metallic object. They each



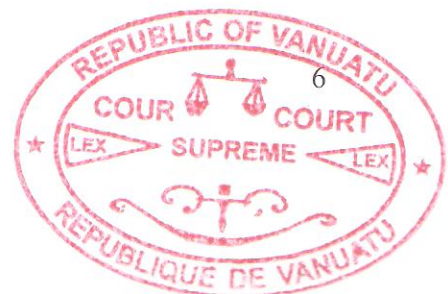
explained why they were prepared to give evidence against the claimant to defend the truth.

- (iv) Bob Selley's evidence is relevant only to the plane floater and there is nothing in it about the claimant finding a metallic object.
- (v) Titus Thomas as head of the claimant's family and house never deposed to any statement or gave any evidence to show he saw the metal at any time. The Court questions why this omission? Flaviana's evidence for the defendant is telling. It shows Titus Thomas chasing Flaviana and her mother out of his house because he was angry that Flaviana had told the defendants that Eric Bob had taken the metallic object out from their house.
- (vi) The evidence of Mrs Malsungai shows nothing about the claimant finding the object.
- (vii) Finally, the claimant admitted to the defendants at their meeting when he finally after two failed attempts, took the metallic object and handed it over to the defendants saying:-

"Okay ol papa, property blong yufala mi karem ikambak long hand blong yufala."

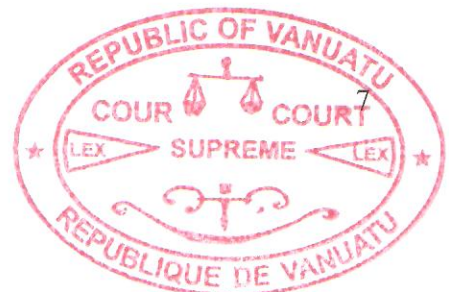
That is a self-destructing statement of admission he cannot retract and deny he made it. He must therefore live with its consequences.

11. Commenting now on the defendants' evidence without going into any great details of each witness' evidence, the Court concludes the defendants presented a more trustworthy evidence in particular that of Jean Claude Delaveau. He was firm and consistent about finding the metallic object. When asked by Mrs Vire to show where he had cut the



object with a knife, this witness did not hesitate for a moment but proceeded straight away to show the vent on the object which he had chipped off. And he was certain about it.

12. The Court believes on the balance of probability it was Jean Claude Delaveau who found the metal in 1991. The Court heard evidence from both sides that Mrs and Mr Thomas went to live at Jean Claude's house when he left to Noumea, New Caledonia. They then moved back to their house at Red Corner Area. The Court infers that the metallic object moved with the couple at this time. Having done so, they then made up the story that it was they who found it. That opportunity came when they found the plane floater in 1995. They then conspired to keep it all quiet because they knew the metallic object was not theirs. That is the only sensible inference the Court can draw on the deliberate admissions by Titus Thomas, Eliane, Sergine, Daniel, Danitza, Tatiana, Claudette, Joseph Malsungai, Herman, Severion and Amosio not giving any evidence about finding the metallic object.
13. In the absence of those other independent evidence, the evidence of Sergio Thomas and Eric Bob for reasons already stated, are insufficient to show it was the claimants who found the metallic object to entitle him to claim possession and/or a declaration that he is the rightful owner.
14. For those reasons, the claimant is unsuccessful in his claims and his claims are dismissed in its entirety. All reliefs claimed by him are therefore declined. And all previous orders made in his favour are vacated.
15. As regards the defendants counter-claims, they are successful. The Court is satisfied the metallic object was found by Jean Claude



Delaveau and as such, the Court declares the object is the property of the Delaveau Family and accordingly it must be returned to them. They are entitled also to orders that –

(a) The claimant and the members of his family be hereby restrained from intervening in any way with the members of the Delaveau Family in relation to the metallic object.

(b) The claimant will pay the defendants' costs of and incidental to this action on the standard basis to be agreed or determined by the Court. The Claimant gave an undertaking as to costs and he is bound by that undertaking.

16. That is the judgment of the Court.

PUBLISHED at Luganville this 5th day of July 2012.

BY THE COURT


OLIVER A. SAKSAK

Judge

