IN THE COURT OF APPEAL **Appeal Case No.6 OF 2000**

THE REPUBLIC OF VANUATU

(Appeal Jurisdiction)

BETWEEN: **ANZ BANK (VANUATU) LIMITED**

Appellant

AND: **DEREK LULUM**

Respondent

Coram: **Acting Chief Justice Vincent Lunabek**

Mr. Justice John W. von Doussa

Mr. Justice Roger J. Coventry

Mr. Justice Daniel V. Fatiaki

Counsel: **Mr. Garry Blake for the Appellant**

Mr. Saling Stephen for the Respondent

Hearing Date: 25 October 2000

JUDGMENT

This is an appeal against various orders made by **Saksak J** in a reserved judgment he delivered on 25th August 2000 in a contested Originating Summons issued by the appellant bank seeking to enforce a registered mortgage over land which had been granted by the respondent to better secure a loan of **Vt700, 000** provided to him by the appellant bank.

In particular, the Originating Summons, sought several orders the broad effect of which was to enable the appellant bank to realise the mortgage security by the exercise of a contractual ***'power of sale'*** granted it pursuant to **Clause 5** of the Mortgage agreement entered into by the parties.

It is common ground that the mortgage in question is an **'on demand'** mortgage in respect of which, prior to the issuance of enforcement proceedings, a written NOTICE OF DEMAND dated 3rd May 2000 and signed by the Manager of the appellant bank, had been served on the respondent pursuant to **Clause 3** of the mortgage agreement. The amount demanded in the NOTICE was ***'VT2, 506, 362 with interest accuring ...'***

The respondent for his part filed a short affidavit in which he admitted that he had ***'stopped making regular repayment of*** (the) ***loan account sometime in October 1999 due to*** (his) ***non-employment'***. He doubted however the total outstanding amount claimed as due by the bank in its demand notice and professed to some difficulty in understanding the bank's loan account statements produced in support thereof. No cross-summons was ever issued by the respondent **nor** was any particular relief sought challenging the exercise by the appellant bank of its power of sale.

There was no actual suggestion of unconscionablity or impropriety either in the terms of the mortgage agreement or in the manner in which the appellant bank was seeking to enforce its ***'power of sale'*** sufficient in our view to enliven the Court's equitable jurisdiction to grant relief against the enforcement of the appellant bank's mortgage.

Indeed the trial judge recited as part of the facts of the case that '(the respondent) ***defaulted in repayments under the terms of the mortgage agreed at VT30, 000 per month'***, and further, that the appellant bank had ***'demanded repayment of the sum then owing to the*** (appellant bank) ***of***

VT2, 515, 945…' and finally, that the respondent had ***'refused or failed to pay on that demand'***. Later in his judgment the trial judge said: ***'the Bank is entitled to the orders enforcing the Mortgage between them and the*** (respondent). ***But the grant of orders will be deferred over a period of six months from the date of this judgment.'***

The reserved judgment reveals that after a three (3) day trial in which witnesses were called by both *parties, the trial judge was persuaded to investigate in some detail, the entries in the appellant bank's statement of account, the total amount due under the mortgage to the appellant bank, and the terms and conditions of the mortgage agreement. In the result the trial judge ruled: 'the Defendant is only liable to the Bank in the sum of VT1, 809, 140 without interest and less the sum of VT40, 775* ***(which was an incorrect double charging of solicitors costs)'***

Then follows a rather unusual paragraph in the judgment about which appellant's counsel expressed much concern. It reads: ***'Under his given circumstances, the Defendant is hereby required and ordered to resume repayments of VT15,000 commencing from 31st August and continuing on every pay day thereafter. In the event that the Defendant fails to make six***

consecutive payments and after the Bank has issued a reminder or demand notice after the third failure, the Defendant shall have liberty to re-apply for the grant of the orders sought. This shall be done simply by writing to the Registrar requesting a re-listing of the matter.'

This passage is ***'unusual'*** for several reasons foremost amongst which is that it represents an unwarranted judicial rewriting of the terms and conditions of the mortgage agreement freely entered into by the parties. The trial judge has also assumed a power to defer the grant of an order under **Section 59 (1)** of the **Land Leases Act** [Cap 163] on conditions, where no such power exists in the **Section.**

We express our further concern that a potential, though perhaps unintended, effect of the trial judge's order is to prevent altogether any action being taken by the appellant bank to recover the debt under **Section 58** of the **Land Leases Act** and to further postpone the time at which and the circumstances under which the contractual ***'power of sale'*** shall become exercisable again by the appellant bank. In this latter regard we note that the judge's order is unclear as to the particular default which would entitle the appellant bank ***'to reapply for the grant of the orders sought'*** viz is it the

failure ***'to make six consecutive payments'?*** or is it the failure to comply with the ***'reminder or demand notice after the third failure'*** (to make the loan repayment)?.

We accept however the various criticisms of the trial judge about the style of drafting adopted in the mortgage agreement which is neither plain or ***'user-friendly'*** (to adopt a colloquialism) but that alone is not a proper ground for refusing its enforcement particularly as the agreement has, without objection, regulated the relationship between the parties over several years.

Be that as it may the grounds in this appeal are as follows:

1. *The Honourable Judge erred in fact and in law in failing to take account of and giving proper weight to the evidence adduced on the part of the Appellant.*
2. *The Honourable judge erred in law in that he misdirected himself in failing to take into account the Respondent's admission in his oral evidence.*
3. *The Honourable Judge erred in law by giving improper weight to evidence not directly called by the Appellant nor by the Respondent.*

4. *The Honourable Judge erred in law in failing to give proper weight to the Appellant's rights set out in the Land Leases Act [CAP 163], and he further erred in his application of Article 5 (1) (j) of the Constitution to bear on his ruling.*

5. *The Honourable Judge erred in law in purporting to exercise a discretion to refuse to grant relief to which the Appellant was in law entitled.*

6. *The Honourable Judge erred in failing to grant the relief, the Appellant sought in the Supreme Court.*

Plainly at the heart of this appeal is the meaning and effect of the statutory provisions dealing with the enforcement of a mortgage. The relevant provisions are **Sections 58 and 59** of the **Land Leases Act** cap 163 which provides:

ACTION FOR RECOVERY OF DEBT

58. Any principal sum or interest due under a mortgage may, subject to the provisions of section 59 (4), be recovered by action in any competent court

ENFORCEMENT OF MORTGAGE

59. (1) Except as provided in section 46 a mortgage shall be enforced

Upon application to the Court and not otherwise.

(2) Upon any such application, the Court may make an order –

(a) empowering the mortgagee or any other specified person to sell and transfer the mortgaged lease, and providing for the manner in which the sale is to be effected and the proceeds of the sale applied;

(b) empowering the mortgage or any other specified person to enter on the land and act in all respects in the place and on behalf of the proprietor of the lease for a specified period and providing for the application of any moneys received by him while so acting; or

(c) vesting the lease in the mortgagee or any person either absolutely or upon such terms as it thinks fit but such order shall, subject to subsection (5), not take effect until registration thereof.

(3) The Court shall, in exercising its jurisdiction under this section, take into consideration any action brought under section 58 and the results thereof.

(4) After the Court has made an order under paragraphs (a) or (c) of subsection (2) or while an order under paragraph (b) of subsection (2) is in force, no action may be commenced or judgment obtained under section 58 in respect of the mortgage except with the leave of the Court and subject to such conditions (if any) as the Court may impose.

(5) Any order made by the Court under this section shall for the purposes of subsection (4) be effective from the time when it is made.

Counsel for the appellant bank forcefully argues that the word ***'may'*** in **Section 59 (2)** should be read to mean ***'shall'*** once the so-called pre-conditions for the exercise of a mortgagee's ***'power of sale'*** have been established, namely, that a default has occurred on the part of the mortgagor in meeting his repayment obligations under the mortgage agreement; that a NOTICE OF DEMAND has been served on the mortgagor requiring payment of the amount due under the mortgage, and finally, that the mortgagor has failed to comply with the notice in the time given.

Counsel for the respondent on the other hand, equally forcefully, asserts that the word ***'may'*** in **Section 59 (2)** ought to be read as granting to the Court an unfettered discretion to either grant or refuse permission as it sees fit having regard to the nature and circumstances of the alleged breach or default by the mortgagor **and** the particular grounds advanced for opposing the application to enforce the mortgage.

In this latter regard counsel for the respondent submitted that the oral evidence revealed various inconsistencies and confusions in the appellant bank's own **Statements of Account**, in particular, those that were identified in the trial judge's judgment pertaining to the double-charging of solicitor's costs and the unexplained variations in the interest rate charged on the respondent's loan account.

We are satisfied however that on neither score is the Court entitled to refuse the grant of an order for the enforcement of a mortgage under **Section 59 (2)**. If we may say so, the legal position is not dissimilar to that prevailing in an application by a mortgagor for an injunction to restrain the exercise by the mortgagee of a ***'power of sale'*** where ***'the general rule has long been established, ..., that such an injunction will not be granted unless the amount of the mortgage debt, if this is not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court'***: *per* **Walsh J** in Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161 at 164.

As for the apparent error in the amount claimed as due in the appellant bank's demand notice, **Walsh J** said, **ibid** at p.166:

'I am aware, of course, that the amended Statement of Claim includes charges that in relation to the keeping of accounts, and in failing to give proper statement of account to the plaintiffs and in other ways the defendant has acted wrongfully...

In my opinion the fact that those charges have been made ... is not a reason for restraining the defendant from exercising its powers under the mortgage. As I have stated, it is not in dispute that there is an indebtedness under the mortgage, that is to say, that there were advances of money which were not repaid. Neither the existence of disputes as to the correct amount of that indebtedness nor the claim ... of the plaintiff for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument'

Quite plainly in our view the recovery of any monies due under a mortgage and the enforcement of a mortgage which has effect ***'as a security only'*** [see: **Section 51 (3)** of the **Land Leases Act**], is subjected to the

overall supervision of the Court. That supervision however is not unlimited and cannot, in our view, extend to the rewriting of a mortgage contract on the basis of some broad undefined principle of fairness or social justice however desireable that might be.

The **Land Leases Act** [CAP 163] confers an authority on the court to enforce mortgages under **Section 59.**

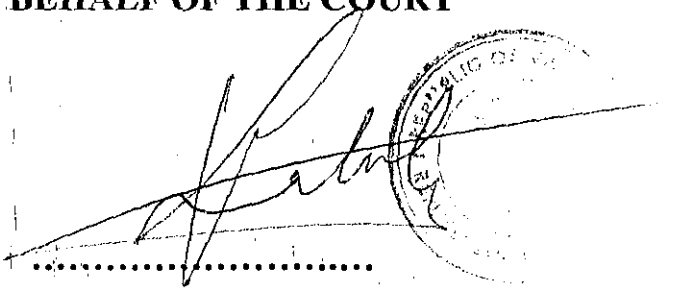
When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested.

For these reasons, we are of opinion that the word ***"may"*** used in **subsection 2** of **Section 59** of the **Land Leases Act** [CAP 163] is not used to convey a discretion, but to confer a power upon the court and judge and the exercise of such power depends, **not** upon the discretion of the Court or judge, but upon the proof of the particular case out of which such power is being exercised.

The appeal is allowed. The orders of the trial judge are quashed and there will be orders in terms of **paragraphs (1), (2), (3) and (5)** of the Originating summons filed on 17th May 2000.

DATED at Port Vila, this 27th Day of October 2000

ON BEHALF OF THE COURT



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Acting Chief Justice Vincent Lunabek