IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No.16/3544 CoA/CIVA

BETWEEN: SANDRINO H. TRAVERSO
First Appellant

AND: ENTREPRISE S. TRAVERSO
Second Appellant

AND: M. LYDIE MARA
Third Appellant

AND: ATOM LIMITED
Fourth Appellant

AND: VECA LIMITED
Fifth Appellant

AND: REPUBLIC OF VANUATU
First Respondent

AND: ANZ BANK (VANUATU) LIMITED
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John William von Doussa
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Ms. Stephanie Mahuk for the First and Second Appellants*
Third, Fourth and Fifth Appellants – no appearance
First Respondent – no appearance
Messrs. Mark Hurley and Abel Kalmet for the Second Respondent

Date of Hearing: *8th day of November, 2016*

Date of Judgment: *18th day of November, 2016*

JUDGMENT

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1. This is an appeal by the first two-named appellants against an order obtained by the Second Respondent (the Bank) striking out the claim of the First and Second Appellants in Civil Case 148 of 2010.

2. At its inception the only named claimants in Civil claim No. 148 of 2010 were the First Appellant (Mr. Traverso) and the Second Appellant Entreprise S. Traverso which is a business name under which Mr. Traverso trades. Further, at its inception the only defendant was the Bank. Over the years other parties have been added to the proceedings as defendants to a counterclaim filed by the Bank. They are named as parties in the notice of appeal, but the appeal is concerned only with issues between the first and second appellants and the Bank.

3. The background to this long running dispute between the appellants and the Bank is as follows. Mr. Traverso has been a long time customer of the Bank both in his personal and business respects. Progressively between 28th April 2006 and 4th June 2008 Mr. Traverso, on behalf of the Appellants, accepted six loan facilities offered after negotiation by the Bank covering both personal, home and business accounts. The last facility granted on 4th June 2008 was for a total facility of VT139,981,206. Interest payable on the various accounts within the facility were stated in the loan offer to be 8.25% on personal loans and 9.5% on business loans.

4. As a result of the 2008 Global Financial Crisis Mr. Traverso and his business encountered financial difficulties and he failed to adhere to the conditions of the loans as to repayment. The Bank applied higher penalty interest rates to the accounts. By mid-2009 the interest rates on personal loans had risen to 13.5% and on business related loans to between 18.05% and 18.85%.

5. Mr. Traverso protested the level of interest being charged. On 27th September 2010 he commenced Civil Case No. 148 of 2010 pleading that the agreement he had with the Bank and its French predecessors was that he would be charged a maximum of 10% interest, and that his loans were governed by French law that prohibited "*Capitalised interests and usurious rates of interest*". The relief claimed included the following orders:

"*(a) An order for the defendant to apply the agreed interest of 10% per annum on the loans contracted by the claimants;*

(b) An order for the defendant to disclose the figures applying the agreed interest;

(c) An order restraining the defendant to further charge the claimants with usurious interests after the filing and service of the claimants' claim;

(d) An order for the claimants to immediately pay and so, to settle their debt with the defendant as soon as the correct figures taking into account the agreed

interest of 10% will be provided by the defendant and agreed by the court or agreed by consent of the parties;

(e) Just compensation for the damages resulting of the defendant's abuse of predominant position and blatant dishonesty ..."

6. The Bank denied the claims and pleaded that the terms of the loans and interest rates being charged by it were as agreed in the documentation on which the Bank relied. By way of counterclaim the Bank sought payment of the outstanding loans and an order requiring the claimants to execute mortgages over three (3) land titles which the Bank alleged had been offered as collateral security to a principal mortgage already held by the bank. The claimants in their defence to the counterclaim denied that collateral security had been offered over the three titles. The counterclaim has since been amended to add additional parties to whom the Bank alleges the three titles have been fraudulently transferred by the claimants to defeat the bank's collateral security. The Republic has also been joined as a party, but the issues raised in the counterclaim both in its original form and as twice amended need not be explored in this judgment.

7. In the course of conference hearings intended to progress the claim to trial the Court sought to have both the claimants and the Bank place on file evidence showing the calculations of the monies which each alleged was due in accordance with the terms of loan facility it propounded.

8. The court canvassed with the parties the possibility of them agreeing to the appointment of a joint expert under Rule 13 of the Civil Procedure Rules to calculate what these respective amounts would be, but the parties could not agree on an expert. That led the Court to make the following order, after hearing the lawyers' for the parties, on 9th October 2012:

"1. *After discussions the issue for consideration by the parties expert is as set out in counsel's letter of 28 August 2012. i.e. What are the balances in respect of each of the claimant's Bank accounts Nos. 798122, 9235256, 1060048 and 1119084 commencing from 20 April 2006 to date?*

2. *Defendant to file and serve expert evidence as to the issue by 23 October 2012;*

3. *Claimant to file and serve expert evidence in response and confined or limited to the contents of any report prepared by the defendant's expert and to the agreed issue by 30 November 2012;*

4. *Defendant to file and serve a sworn statement in reply by 12 December 2012;*

5. *Matter adjourn for review and further directions on 13 December 2012 at 9.00 a.m."*

9. On 22nd October 2012 in compliance with paragraph 2 of this order the Bank filed a comprehensive report, over three hundred pages in length, prepared by Mr. Roger Jenkins. Mr. Jenkins summary of the balances calculated as at 31st July 2012 were:

a.	***Total balance as per Bank statements***	-	***VT203 376 178***
b.	***Recalculated by Mr Jenkins per loan facility documentation***	-	***VT199 608 757***
c.	***Recalculated by Mr Jenkins applying 13.5% per annum to the business loans/10.5% per annum to the personal loans***	-	***VT173 988 579***

10. The claimants did not file any statement of account required by the order of 9th October 2012. On 13th December 2012 at the next schedule hearing the Court adjourned the matter until 19th February 2013 "*to allow claimants' expert to produce and serve his report in advance on defendant's counsel*". The claimants were ordered to pay VT5,000 wasted costs to the defendant before 19th February 2013.

11. On 19th February 2013 the claimants had still not filed any expert report. On that day lawyers for the parties appeared before the conference judge. The bank's lawyer said that the Bank was seeking to have the three titles over which it claimed collateral mortgages transferred back into the name of the claimants. The lawyer for the claimants said that he had ceased to act for the claimants and on 14th February 2013 had filed a notice to that effect. He said he had communicated with Mr. Traverso who was in Noumea who said he would instruct other counsel. The lawyer was excused from further involvement in the matter. The bank's lawyer said that the Bank would be filing an application to strike out the claim for non-compliance with the earlier orders. The matter was further adjourned to 22nd March 2013.

12. On 18th March 2013 the Bank filed and personally served an application to strike out the claim along with sworn statements in support.

13. On 21st March 2013 the claimants filed a document entitled "*Claimant's Memorandum*" to which was attached a letter dated 30th August 2010 from Mr. Martin St Hilaire, a chartered accountant, addressed to the bank's head

of risk which attempted to trace and explain the claimants' dealing with the Bank for the period from 2003 to 2010. Attached accounts for "*Entreprise Traverso*" show that at 31st May 2010 there was a total indebtedness to the Bank of VT138,101,998 for the claimants' five accounts. Mr. St Hilaire's letter said that he identified a purported over payment of interest totaling VT8,621,429 for the period July 2009 to May 2010. His letter also confirmed that "*Mr. Traverso is unable to pay the full amount required by ANZ*".

14. On 22nd March 2013 when the matter was called on Mr. Traverso appeared in person. The bank's lawyer sought an order striking out the claim for non-compliance with the orders of 9th October 2012 and 13th December 2012. The Bank argued that the memorandum and its attachment did not meet the requirements of the orders, and said that the claimants remained in default to the bank. Mr. Traverso addressed the judge. The judge's notes record "*I can't continue to pay my lawyer without a result. My lawyer never advised me about the orders and no longer acts for me. The letter of acceptance of terms of the loan was only signed on the last page only, likewise in many other variation of loan letters. Memo attaches Montgolfier 'audit*".

15. The claimants in the memorandum, and in other material earlier put before the Court, had alleged that Mr. Traverso had only ever seen and signed the last page of the long facility offers, and earlier pages purportedly bearing his initial "*ST*" had been forged. There was however at that time a sworn statement from a Bank officer on file that deposed that he had been present when two of the facility offers had been discussed with Mr. Traverso in person, and had seen him initial each of the pages before signing the last page.

16. At the conclusion of the hearing on 22nd March 2013 the judge reserved his ruling on the strike out application.

17. Nothing then happened.

18. In August 2016 the Bank, no doubt feeling seriously frustrated with the delay, applied for leave to amend its counterclaim. Leave being granted, it filed an amended counterclaim on 5th September 2016 seeking orders for the re-transfer to the claimants' of the three titles over which it was seeking mortgages as collateral security.

19. On 23rd September 2016 the Court ordered that the claims be struck out the trial judge delivered reasons for judgment. He concluded:

"I am satisfied that the Bank has strictly complied with the procedural requirements of Rule 18.11 (concerning Strike Out Applications). I am also satisfied that the Claimant was given sufficient time to comply with the Court's orders of October and December 2012 and failed to do so. Moreover the claimant did not seek an extension of time to comply or explain his non-compliance. In short, the Claimant has failed to "show cause" why an order should not be made ...".

The Court directed that the counterclaim should follow its normal cause and gave directions to facilitate that happening.

20. In this appeal the appellants contend that the strike out should not have been ordered, and seek to have the claim re-instated. The notice of appeal identified five grounds of appeal. The appellants' counsel argued four of these grounds and abandoned one. In our opinion the grounds of appeal do not establish any error in the making of the order, or any miscarriage of justice that would otherwise require that the order be set aside. We deal with each of the grounds of appeal that have been very ably argued.

21. **The passage of time**
The appellants contend that the delay of three and a half years between the hearing and the delivery of the ruling has caused miscarriage of justice as the delay raises questions as to the judge's recollection of arguments. The Court was referred to Société des Services Pétroliers SA v. Raynaud [2014] VUCA 4 and to other authorities referred to in the reasons for judgment for that decision which establish, as counsel submitted, that where there is substantial delay the Court must carefully scrutinize the total circumstances to ascertain if by reason thereof the judicial process has lost its integrity. The need for careful scrutiny is especially so where the Court is required to make findings of facts on contested evidence led at trial. However that is not this case. Here the evidence as to non-compliance with the earlier orders of the Court was contained in uncontested written sworn statements, and the records of the Court. The only information before this Court as to the extent of argument before the judge on 23rd March 2013 is contained in the judge's notes already referred to. His notes indicate that no contentious factual issues were argued. The note was there to refresh the memory of the judge in so far as refreshment was necessary. In our opinion delay has not been shown to have any possible effect on the reasoning process of the judge.

22. Under this ground of appeal the appellants also challenged three specific aspects of the reasons of the trial judge. First, they argued that the order of 13th December 2012 simply adjourned the matter without setting any new time limit within which they were to file expert report and for this reason it could not be concluded that they had failed to comply with the order. The

time limit had been set by the order of 9th October 2012. The appellants were already in default by 13th December 2012, and the order of that day was to give them an opportunity to remedy their non-compliance. They did not do so by the hearing on 19th February 2013. The judge did not fall into error in holding that there had been non-compliance with orders.

23. Secondly, the appellants argued that the Memorandum filed on 21st March 2013 by Mr. Traverso constituted sufficient compliance with the orders, and challenged the finding that the Memorandum "*fell well short of complying with the Court's order of 9th October 2012*". A purpose of that order was to require the appellants to identify what money they admitted was owing so that there was evidence to support their request in the claim for an order directing payment of a sum incorporating a 10% interest rate to the Bank. What was required was an up-to-date calculation. Mr. St Hilaire's letter attached to the Memorandum did not provide that information, and moreover was not a response to the bank's expert's report as had been ordered. We consider the trial judge's assessment of the Memorandum as falling well short of compliance was correct.

24. Thirdly, the appellants argued that there was no evidence before the Court that the wasted costs orders of VT5,000 had not been paid. That submission is not correct. The sworn statement of Mr. Kalmet dated 18th March 2013 filed in support of the Bank's application deposes that the costs had not been paid. Mr. Kalmet's sworn statement has not been challenged.

25. **No opportunity afforded for appellants to instruct replacement counsel**

The appellants argued that they should have been granted more time to seek further legal representation, and further time would not have prejudiced the Bank. There had been more than a month since the notice of ceasing to act had been filed by the time of the hearing on 22nd March 2013. It is to be assumed that the appellants were aware of the order of 9th October 2012 made more than five months before, and prior to that there had been discussion between the judge and counsel as to the need for expert evidence of the kind eventually ordered. Important to the consideration of this argument is the fact that at the hearing on 22nd March 2012 Mr. Traverso said that he could not afford further legal representation. Apparently he had himself prepared the Memorandum and filed it. The Memorandum indicates that the appellants were well aware of the issues before the Court. Then, at the hearing, Mr. Traverso did not seek further time. In all the circumstances we consider the judge did not err in not giving

further time in the off chance that the appellants might seek new legal representation.

26. In this appeal sworn statements were filed without opposition from both Mr. Traverso and his former lawyer. The lawyer deposed that although he had filed a notice that he was no longer acting on 14th February 2013 he nevertheless intended to appear at the hearing on 22nd March 2013 to seek leave to withdraw and to ask for a further extension of time. However the day before he became stranded by ill-health on another island and could not appear. He deposed that he informed Mr. Traverso of his indisposition and told him to inform the judge of this fact and ask for an adjournment. Mr. Traverso's sworn statement deposes that his lawyer did inform him of his indisposition the day before the hearing and advised him to so inform the judge and request an extension to file the outstanding expert evidence. The assertions in these two sworn statements do not ring true. The lawyer had already appeared before the judge on 19th February 2013 and had been excused. If Mr. Traverso was advised on 21st March 2013 that his lawyer would not be able to appear as intended to ask for an extension, it is surprising that the Memorandum dated 21st March 2013 was filed that day. Further, on the hearing on 22nd March 2013 the judge's notes make no reference to the former lawyer or his inability to attend due to ill-health, and Mr. Traverso did not apply for an extension. We consider the matters deposed to in these statements are in such conflict with the evidence of events on the court file that they cannot be accepted as reliable.

27. **Rejection of expert's evidence of appellants**
The appellants argued that if the Court expected an expert opinion "*of some standard*", presumably of the kind anticipated in the order of 9th October 2012, the Court should have appointed an expert under Rule 11.3(1) of the Civil Procedure Rules. Instead the Court allowed the parties to appoint their own experts. This submission then postulates that because of the lack of communication between the appellants and their counsel the Memorandum should have been accepted as meeting the appellants' standards for compliance, and the claim should have been allowed to proceed to trial. The ground of appeal abandoned before this Court alleged that the trial judge erred in failing to take into account the appellants' complaints that their counsel failed to communicate with them about the orders of 9th October 2012 and 13th December 2012. The basis for the present submission namely that there was a lack of communication between the appellants and their counsel was simply not established before this Court, and indeed was abandoned. No basis exists for the argument that the judge should have allowed the claim to proceed to trial because the appellants did

not understand the important of the order requiring expert evidence. In any event this is a farfetched proposition as it was of the essence of the appellants' claim that they established the amount which they said they should be paying to the Bank. It was entirely understandable that the Court should order that they do so before the matter proceed to trial.

28. **New evidence**
The final ground on which the strike out is challenged is that the appellants have discovered new evidence they wish to adduce which, if it had been before the trial judge, could have led to a different decision.

The new evidence is said to be the recent discovery by Mr. Travero of a copy of the bank's offer of the 6th loan facility dated 4th June 2008. In a sworn statement Mr. Traverso says that following cyclone Pam his workshop and pertinent documents were destroyed but in early September 2016 he discovered the copy of the letter of offer dated 4th June 2008 in another location. The copy letter is said to be inconsistent with the facility offer dated 4th June 2008 relied on by the Bank in support of its counterclaim in respect of collateral security. Apart from the fact that the appellants offer no explanation why this copy letter they say constitutes new evidence could not have been procured by the exercise of reasonable diligence in the period between 29th October 2010 when the counterclaim was first filed, and 22nd March 2013, the so-called "*new evidence*" had it been before the trial judge would have been irrelevant to the strike out application. At the most the letter relates to issues raised in the counterclaim concerning collateral security and those issues were not affected by the claim being struck out.

29. If the "*new evidence*" is of any significance in the overall dispute between the Bank and the appellants it can still be raised in the trial of the counterclaim. The strike out order does not limit to the appellants' ability to make whatever they can from that copy letter.

30. In our opinion none of the grounds of appeal by the appellants have been made out. We consider the judge did not fall into error in holding that there had been non-compliance with the earlier orders. We consider no error has been demonstrated to show that the judge's exercise of his discretion to strike out the claim was not properly exercised. The appeal is therefore dismissed and costs must follow the event.

31. Before this Court there was brief discussion whether it could be open to the appellants to seek leave to commence a further action raising again the

same issues that they sought to agitate in their claim. Whether the Supreme Court has jurisdiction to allow a further claim to be maintained is not an issue before this Court and has not been argued. We make no comment on whether the possibility exists save to note that even if the jurisdiction does exist, it is likely that it could only be invoked if the appellants first pay to the Bank what they concede is payable, that is the principal sums advanced to them together with 10% interest.

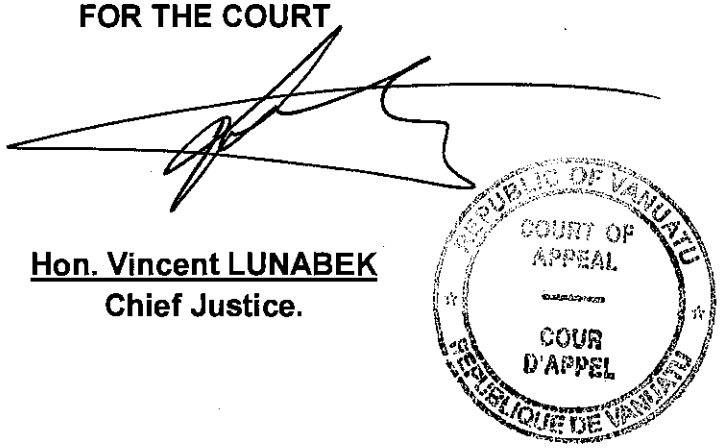
32. The orders of the Court are:

(a) Appeal dismissed;

(b) The First and Second Appellants are to pay the Second Respondent's costs to this appeal to be taxed at the standard rate.

DATED at Port Vila, this 18th day of November, 2016.

FOR THE COURT



Hon. Vincent LUNABEK
Chief Justice.