

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

Civil Case No. 136 of 1997

1996?

IN THE MATTER OF: a Mortgage dated the 28th day of  
September 1993

AND

IN THE MATTER OF: The Land Leases Act 1983 [CAP. 163]

**BETWEEN:** GIANCARLO CASTELLI of Australia and  
MITA FINANCIAL SERVICES LTD an  
incorporated Company in Vanuatu

Plaintiff

**AND:** SOUTH PACIFIC PROPERTIES &  
INVESTMENTS LIMITED an  
incorporated Company in Vanuatu

Defendant

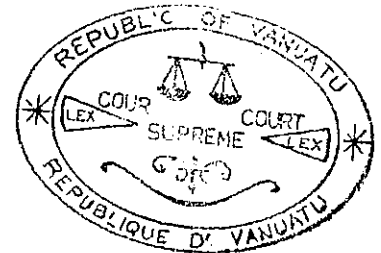
Coram: Mr Justice Oliver A. SAKSAK

Mr John Malcolm for the Plaintiff

Mr Ozols representing Mr Silas Hakwa

Mr Tony Vita appears unrepresented but speaking through Mr Roger de  
Robillard.

**JUDGMENT**



The Plaintiff seeks to enforce mortgages under the provision of section 59  
of the Land Leases Act [CAP. 163]. The Plaintiff applies by way of an

Originating Summons filed on 15th October 1996 issued under Order 57 Rules 4 & 8 of the High Court (Civil Procedure) Rules 1964.

At the preliminary stage counsel for the Plaintiff objected to Mr de Robillard appearing on behalf of Mr Tony Vita because of his uncertain status as legal practitioner admitted to practise in Vanuatu. Mr de Robillard told the Court that in view of the objection he suggested that if the Court should grant leave for him to appear it should be on the same basis as the Court of Appeal granted him leave in Appeal Case No. 3 of 1997: Leymand -v- Ombudsman.

Mr Vita's previous solicitors were Messrs Silas Charles Hakwa & Associates. Mr Hakwa filed a Notice of withdrawal on 27th October 1997. In view of the duplicity and complexity of the case the Court thought it was appropriate to grant leave to Mr de Robillard to speak for Mr Vita on 27th October not as a solicitor representing client or as amicus curiae but simply as a spokesperson.

There are two matters before the Court. The first is the Originating Summons by the Plaintiff seeking Order to enforce mortgages, and the second is a Notice of Motion filed by Mr Vita seeking to have Mr Silas Hakwa joined as a party to the proceedings, that Civil Case No.140 of 1994 be restored and that it be heard simultaneously with Civil Case No.136 (the instant case) by the Court.

I deal first with the Originating Summons of the Plaintiff. An affidavit by Stephen Pellegrino was filed in or about October 1996 in support of the originating summons. He annexes the Mortgage, a Notice of Demand, a Deed of Agreement among other documents. The documents were served on the 1st Defendant, Mr Hakwa and Mr Vita on 11th December 1996. An affidavit of service from Simon Joel Sisi filed on or about 23rd December 1996 deposed to these facts.

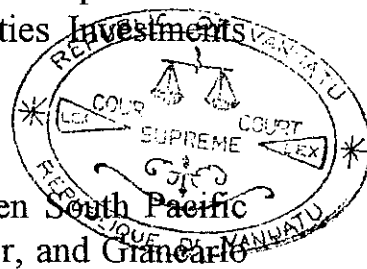
## ISSUES

### 1. Who Are The Parties?

- As far as Civil Case No.136 of 1996 is concerned the parties are Giancarlo Castelli, Plaintiff and South Pacific Properties Investments Ltd, Defendant.

### 2. Is There A Mortgage To Be Enforced?

A Mortgage dated 28th September 1993 exists between South Pacific Properties & Investments Ltd (Defendant) as Mortgagor, and Giancarlo



Castelli and Mita Financial Services Ltd (Plaintiff) as the Mortgagees. Stamp duty was paid on the Mortgage on 6th October, 1993 and registered at the Land Records Office on 8th December 1993.

3. Is There A Notice Of Demand?

- \* A Notice is required under clause 1 of the First Schedule of the Mortgage. On 25th September 1996 a Notice of Demand addressed to
- \* the Defendant/Mortgagor was delivered. This is in evidence as Annex "B" to the affidavit of Steven Pellegrino. Despite the Notice of Demand, no payment was and has been made.

The answers to all these issues are in the affirmative and would have been enough to satisfy the Court to grant the Orders enforcing the Mortgage. However upon careful examination of the documents before the Court there are certain defects or omissions which must be attributed to the Plaintiff.

Firstly the Plaintiff has omitted to annex copies of the actual leases or leasehold titles which are referred to in the Mortgage as 12/0821/027-052 and 12/0822/046-062. This Court must know who the actual lease holders are and indeed any interested party who may be affected. The absence of these documents means that there is no full disclosure and the Court is unable to decide on incomplete or insufficient evidence.

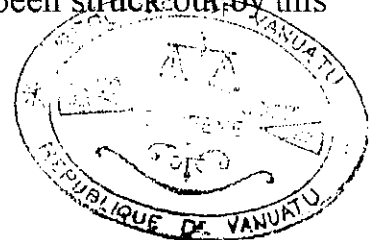
Secondly there is a document that causes much problem and difficulty. This is the Deed of Agreement annexed "D" in the affidavit of Steven Pellegrino.

There are 4 parties to this Agreement. There are:-

- (1) TONY VITA
- (2) SOUTH PACIFIC PROPERTIES & INVESTMENTS LTD
- (3) STEPHEN PELLEGRINO
- (4) GIANCARLO CASTELLI.

The Agreement is dated 15th March 1996. It is interesting to note that only 3 parties have signed the Agreement. South Pacific Properties & Investments Ltd are not signatory to that Agreement.

The Agreement was made to resolve all differences which had arisen between them in relation to the beneficial ownership of properties which were the subject-matter of Civil Case No.140 of 1994. Tony Vita was Applicant in this case and South Pacific Properties & Investments Ltd and Mele Trustees were the Respondents. This case has been struck out by this Court on 7th August 1997.



The Court asks what the relevance of putting into evidence an Agreement that relates to a case which has been struck out. In paragraph 5 of Mr Pellegrino's affidavit he says:-

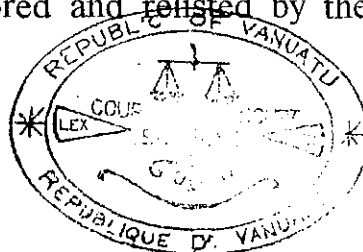
*"On or about 15th March 1996 the parties entered and Agreement to withhold any action for a period of six months pending payment to the beneficial owners. I annex hereto and mark "D" a copy of such agreement. To date no payment has been made."*

With that the Court is of the view that there must be some connections between this case and Civil Case 140 of 1996. And Civil Case 140 of 1996 must still be alive and therefore should be restored.

Under the terms of the Agreement Mr Vita has been placed under a great financial obligation which in view of paragraph 5 of Mr Pellegrino's affidavit seems to me to be part of the claim under the mortgage. If this is correct then Mr Vita should be made a party to these proceedings. At the moment he is not but having filed his Notice of Motion seeking restoration of Civil Case No. 140 of 1996, it is clear indication that he is directly affected because of the existence of the Deed of Agreement. Having said all that, it is not necessary to deal any further with Mr Vita's application. The Orders sought by the Plaintiff are refused on process and the Orders sought by Mr Vita are granted except leave to join Mr Hakwa as a party which is refused.

For the reasons given above the Court makes the following orders:-

- (1) That the Originating Summons of the Plaintiff be adjourned sine die.
- (2) That the Plaintiff be given leave to amend his Originating Summons to include Tony Vita as a party.
- (3) That the Plaintiff be given leave to file a further affidavit showing copies of Leasehold Titles referred to in the Mortgage.
- (4) With respect to the Notice of Motion that:-
  - (a) The Order of this Honourable Court dated 7th August 1997 be and is hereby set aside.
  - (b) Civil Case No.140 of 1994 be restored and relisted by the Registrar for proper hearing.




- (c) The Parties be at liberty to file and serve further documents in respect of Civil Case No.140 of 1994 by no later than 31st December 1997.
- (d) Civil Case No.140 of 1994 be heard separately and be heard in advance of Civil Case No.136 of 1996.
- (e) Civil Case No.136 of 1996 be relisted after completion of Civil Case No.140 of 1994.

(5) That costs be reserved.

(6) The Applicant, Mr Tony Vita pays the costs of the hearing of his Motion against Mr Hakwa to Messrs Ozols and Associates to be taxed, if not agreed.

**Dated at Port Vila, this 28th day of November 1997.**

**BY ORDER OF THE COURT**



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**Oliver A. SAKSAK**  
**Judge**

