

BETWEEN: ANZ BANK LIMITED
Claimant

AND: LOUIS KALNPEL
Defendant

Coram: Justice Oliver A. Saksak

Counsel: Abel Kalmet for the Claimant
Defendant in person unrepresented

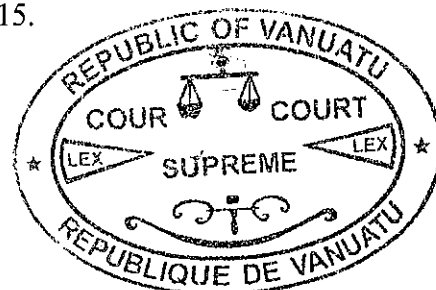
Date of Hearing: 28th September 2016

Date of Judgment: 6th December 2016

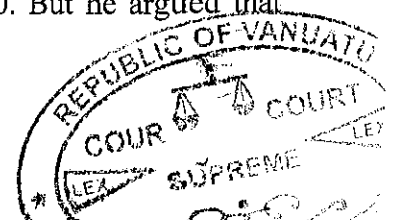
JUDGMENT

Introduction and Background

1. The Claimant Bank filed this proceeding on 4th June 2016 as Mortgagee claiming in the main amongst others, an order that the Bank be empowered to sell and transfer leasehold property contained and described in Leasehold Titles 12/0633/767 and 12/0923/181 (the Properties) by such means and in any manner deemed fit.
2. The Claimant also filed on the same day the evidence in support of their claims contained in the sworn statement of Lisa Nato.
3. The claim was served on the defendant personally by Christine Esau at the Parliament House on 17th June 2016. The defendant acknowledged and accepted service. A sworn statement as to service was filed on 19th June 2016.
4. The Claimant filed another sworn statement of May Boe on 18th November 2015. This was in support of the Claimant's Request for default judgment filed on 17th November 2015. A Memorandum of Formal Proof was also filed on this date. The defendant was further served with these documents on 18th November 2015. Christine Esau filed a sworn statement as to service on 20th November, 2015.



5. Despite having been served with the Claimant's claims on 17th June 2015 the defendant did not file any defence.
6. The Court sat on 20th November 2015 but adjourned the matter to 1st February 2016. The defendant was not present on this first sitting date.
7. On 1st February 2016 Mark Hurley appeared, the defendant did not. A minute was issued by the Court recording amongst others, that there was discussion held by the defendant with the Claimant about refinancing his loans. The case was adjourned to 15th February 2016.
8. On 15th February 2016 both Abel Kalmet and the defendant were present. They agreed to a further adjournment for 2 weeks to finalise arrangements to 15th March 2016.
9. On 29th February 2016 Abel Kalmet and the defendant were present. They agreed to a further adjournment for 2 weeks to finalise arrangements to 15th March 2016.
10. On 15th March 2016 Abel Kalmet appeared, the defendant did not. Mr Kalmet sought a further adjournment of 2 weeks to 29th March 2016. This was to enable the defendant to furnish the Bank with some documents about the restructuring of his loans.
11. On 29th March 2016 Abel Kalmet attended Court, the defendant did not. A further 2 weeks adjournment was requested so the defendant would furnish the Bank with his documents. The case was adjourned to 19th April 2016.
12. Prior to the hearing on 19th April 2016 the Claimant filed another sworn statement by Lisa Nato. At the hearing the defendant was present. He was served with that statement only that day prior to attending Court. He complained of unfair treatment by the Bank. He referred to the refinancing arrangements made with the Bank in February 2016 and argued that as he had faithfully been paying VT 140.000 per month since, he did not understand why he was in Court. He did not deny his loan with the Bank which amounted to in excess of VT 16.000.000. But he argued that



because the Bank had doubts about his ability to repay the loan, he requested an adjournment for one (1) week. The Court granted an adjournment for one (1) month for the defendant to make final arrangements with the Bank regarding his employment status and his housing rentals. The Court also required him to file and serve sworn statements within the one month allowed. The case was adjourned to 19th May 2016.

13. On 19th May 2016 at 9:15am the defendant filed an application to stay proceeding on grounds that:

- a) He had filed a Notice of Appeal against the orders issued on 19th April 2016 to have it reversed, and to have the case or proceeding dismissed.
- b) The Court of Appeal sits only twice each year and due to the possibility of delay that the proceeding be stayed pending determination of his appeal.

14. On 19th May 2016 the scheduled hearing was vacated due to the judge being on criminal tour to Santo. The matter was therefore adjourned to 24th June 2016.

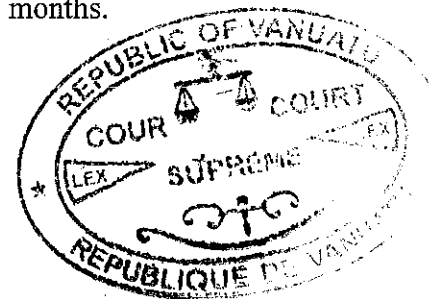
15. On 24th June 2016 Abel Kalmet appeared, the defendant did not. The Court adjourned the matter to 4th August 2016.

16. On 3rd August 2016 at 10:15am the defendant filed in the Supreme Court an application seeking orders that-

- a) Leave be granted to him to appeal the interlocutory order of 19th April 2016, and
- b) Costs be in the cause.

The grounds of the application were that-

- a) The refinancing arrangement dated 12th February 2016.
- b) Despite the existence of the agreement the Bank is still proceeding against him although he had faithfully repaid his loans for the past 5 months.
- c) He was prejudiced by the Bank's action.



17. The defendant attached to his application the following documents:

- a) Letter by the Bank dated 12th February 2016
- b) Notice of Appeal dated 19th May 2016
- c) Copies of three cheque butts showing payments made by him to the Bank on 12/02/016 (VT 160.000), 1/4/016 (VT 150.000) and 29/4/016 (VT 150.000), and
- d) Copy of the Court Order dated 19th April 2016.

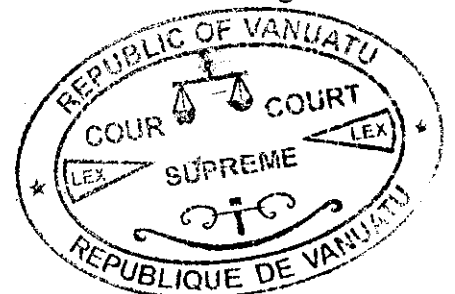
18. On 4th August 2016 the Court sat and both Mr Kalmet and the defendant were present. The Court heard the defendant's application and dismissed it. The reasons are contained in the Decision of the Court issued on 4th August. As a sensible way forward the Court issued directions requiring the parties as follows:

- a) The defendant to file and serve his defence and sworn statement in support within 28 days (by 31st August 2016), and
- b) The clamant to file and serve responses within 21 days (by 16th September, 2016.

The matter was made returnable for further conference on 19th September 2016.

19. On 15th September 2016 at 2:45pm the defendant filed his sworn statement in support of "the application to stay proceeding". He deposed as follows:

- a) "I have filed an amended notice of Appeal with the Court of Appeal in Civil Appeal Case 1612 of 2016. I have requesting (sic) to reverse the last orders given in this case on the 19th day of April 2016 and on the 4th day of August 2016. I have also requested to have a new Justice assigned to this civil case since I realise there is in Justice given to me by Justice Oliver Saksak in this matter. The amended notice of Appeal is attach (sic) as Exhibit 1.
- b) I apply that this Court will stay the proceedings of this case until the higher Court will hear the appeal."
- c)



20. Annexed to the sworn statement were:

- a) The defendant's amended sworn statement filed at 2:05pm on 15th September 2016,
- b) The Bank's letter of 12th February 2016,
- c) The Order of 19th May 2016, and
- d) The Decision dated 4th August 2016.

The defendant did not annex a copy of his Amended Notice of Appeal dated 15th September 2016 which he had filed earlier at 2:05pm that day.

21. At 2:45pm on 15th September 2016 the defendant filed another application to stay proceedings 110 of 2015 pending the determination of his appeal by the Court of Appeal.

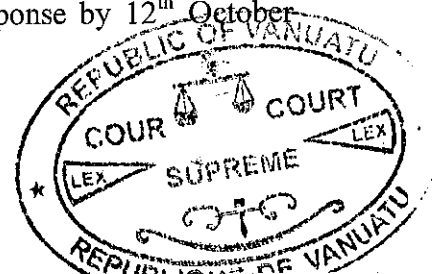
22. On 19th September 2016 the Court sat to hear the defendant's application filed on 15th September. The Court dismissed the application for reasons that:

- a) It was an abuse of Court process in that it was (a) res judicata and (b) it was filed without leave being first obtained.
- b) The defendant had failed to file any defence in compliance with the orders dated 4th August 2016.

The Court then adjourned the matter for a formal proof hearing to 28th September giving the defendant 7 days to file some evidence.

23. On 23rd September 2016 the claimant filed the sworn statement of Lisa Nato.

24. On 28 September 2016 the Court sat for the formal proof hearing. The defendant was present but he sought an adjournment having only been served with Lisa Nato's sworn statement. He requested for 7 days to file written submissions. The Court granted the adjournment with directions to the defendant to file submissions by 6th October 2016 and to the Claimant to file submissions in response by 12th October 2016.



25. On 6th October 2016 the defendant filed his written submissions and the Claimant filed their responses on 28th October 2016.

Relevant Facts of the Case

26. The defendant obtained two loans from the Claimant in June 2007. The first loan for the sum of VT 6.672.000 for which he provided security by mortgaging his leasehold title 12/0633/967. The mortgage was signed on 18th June 2007. The second loan was a collateral loan of VT 6.672.000 for which the defendant provided security by a collateral mortgage over his leasehold title 12/0923/181.

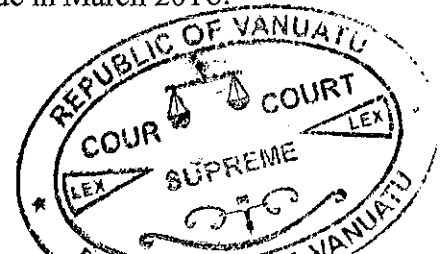
27. On 15th November 2011 the Claimant offered a Home Loan facility of VT 12.812.836 to the defendant the purpose of which was to amalgamate the two existing facilities into one Home Loan. The interest rate offered was 10.50% per annum. The term was for 360 months from the date of original advance (18th June 2007). Repayment was to be VT 119.000 per month.

28. The defendant accepted the offer by signing the Acceptance Letter dated 24th November 2011.

29. The defendant defaulted in repayments for more than 6 months and had arrears in the sum of VT 796, 251. The amount had increased to VT 3.642.989. The Claimant therefore served a Notice of Demand dated on 20th October 2014, on the defendant on 21st October 2014.

30. In June 2015 the Claimant filed their claims in the Court. The defendant had not paid any monthly payment of VT 119.000 for June, July, August, September, October, November and December 2015.

31. Under the Loan Agreement of 12th February 2016 the defendant paid VT 310.000 in February, VT 300.000 in April, VT 150.000 in June, VT 145.000 in July, VT 65.000 in August and VT 65.000 in September. No payments were made in March 2016.



32. From 12th February 2016 the total repayment due was VT 1.176.000. Only VT 1.035.000 was received. The shortfall is VT 141.000.

33. On 16th September 2016 the Claimant served another Notice of Demand on the defendant showing the total outstanding loan to be the sum of VT 16.601.748.

34. By a memorandum of formal proof filed by the Claimant on 17th November 2015 the Claimant submitted the Court the land Leases Act [CAP.163] and grant mortgage power of sale orders and related reliefs to the claimant.

Discussions

35. I have considered the defendant's written submissions filed on 6th October, 2016. On his unnumbered page (page 6) the defendant under his Heading "*the real issues of this controversial casse (sic)*" he states:

"(a) Customers service failure of ANZ Bank to efficiently communicate with its client."

"(b) The Bank has a failure system of recording of loans and its show off during electronic system failure of online scam group who come through their system to take money from account of customers."

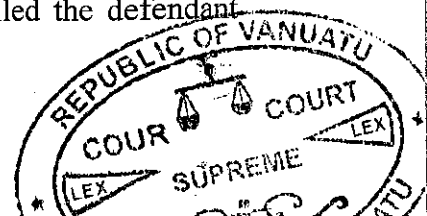
"(c) There is a case settle (sic) of dispute outside the Court in February 12, 2016 between the ANZ BANK AND THE DEFENDANT when warrants an immediate dismissal of the Civil Case No. 110 of 2015."

"(d) The fundamental issue of justice.

i. There is no locus stand in this case for both parties to continue as they already settle the matter outside the Court on (sic) February 2016.

ii. Breach of my constitutional right to fair justice and protection under the law of Republic of Vanuatu [Article 5 of the constitution (sic)]"

36. The defendant did not at any time file any defence and/or counter-claims. He was served personally with the claim on 17th June 2016. On 4th August 2016 the Court afforded him the opportunity to file a defence within 28 days (by 31st August 2016). The defendant failed to comply with those directions. Having failed the defendant



cannot be raising those matters as issues when he did not plead them in a defence or a counter-claim.

37. The defendant raised the point of locus standi in the basis both parties had settled the matter on 12th February 2012. That submission is untenable and is rejected. The Agreement of 12th February 2016 contained the terms and conditions of the defendant's refinanced loan facility. The Agreement is in the form of a letter and it states:-

*" Friday 12th February 2016
Mr Louis Kalnpel
C/o Parliament House
Port Vila
VANUATU*

Dear Mr Kalnpel,

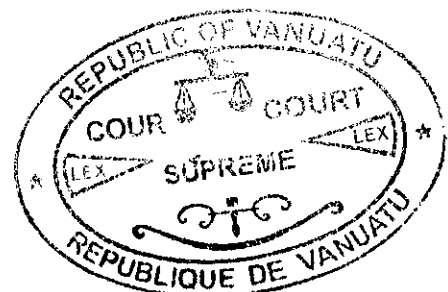
We write to advise that the following our recent discussion, ANZ Bank (Vanuatu) Ltd bank agreed to restructure your facilities as follows. Please note that this restructure is the last measure of the Bank's assistance.

Details of the new arrangement for Home Loan

<u>Amount</u>	<u>VT 16.030.383</u>
<u>Account Number</u>	<u>1148436</u>
<u>Purpose</u>	<u>Restructure of Loan Repayment</u>
<u>Interest Rate</u>	<u>10.50% per annum (variable and subject to review)</u>
<u>Repayment</u>	<u>VT 73,500 per fortnight effective 12/02/2016</u>
<u>Term</u>	<u>309 months remaining</u>
<u>Security</u>	1) <u>Mortgage over property title no.12/0633/767 located at Bladinere Estate</u> 2) <u>Collateral Mortgage over property title no. 12/0923/181 located at Teoumaville collateral to (1)</u>

Special Conditions

- Loan repayment of VT 73.500 per fortnight must be made in full effective 17th December 2015.
- Anyone missed repayment will result with the bank serving a Notice of Demand with legal Action to follow.



The Bank reserves its rights and remedies in respect of the existing default under your facilities, as described in Terms and Conditions provided with your Letter of Offer dated 15th November, 2011.

Please sign and return the attach copy of the letter in acknowledgements of your acceptance of the above re-arrangement.

Should you have any queries regarding the above, do not hesitate to contact the undersigned.

Yours Sincerely,

Lisa Nato

Manager Recoveries

Dated at Port Vila, Vanuatu 12/02/2016

The above offer is accepted subject to the terms and conditions stipulated.

(signed)

Mr Louis Kalnpel

(Customer) ”

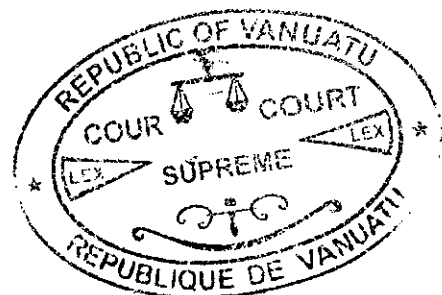
(Emphasis added)

38. The letter is clear. It speaks for itself. There was an offer by the Bank and there was clear acceptance by the defendant.

39. The purpose of the Agreement was “ Restructure of Loan repayment.” It was not and is not a settlement agreement as submitted by the defendant.

40. The special conditions are very clear. Loan repayments are to be VT 73.500 per fortnight effective from 17th December 2015. Evidence from Lisa Nato (Statement filed 23rd September 2016) shows there were no fortnight payments from December 2015 and January 2016. There was no payment in May 2016. In the second half of June and the first half of July 2016 VT 65.000 were paid by the defendant and not VT 73.500 as agreed. In the second half of August and September 2016 the defendant only paid VT 65.000 and not VT 73.500 as agreed.

41. Clearly the defendant had missed not only one repayment, but about 8 repayments on a fortnightly basis as agreed. Those failures resulted in the Bank issuing two letters of demand, the letter dated 16th September 2016 being the relevant one. That was in accord with the Agreement of 12th February 2016.



42. Clearly there was a mortgage over the defendant's title 12/0633/767 located at Bladiniere Estates and a collateral mortgage over the defendant's other title 12/0923/181 located at Teoumaville. The defendant had provided security for his loan by mortgaging these titles under the expressed Agreement of 12th February 2016.

These Mortgages are disclosed in the sworn statement of Lisa Nato filed on 4th June 2015. (See Annexure "LN1).

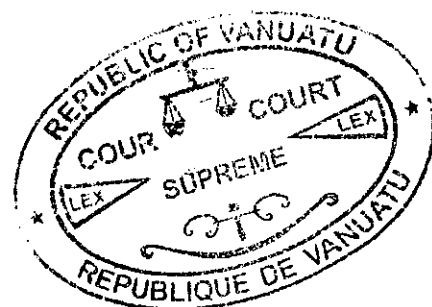
These Mortgages are registered. As such I accept the Claimant's submission that they convey indefeasibility of title in favour of the Claimant. See Chandra & Anor .v. Perpetual Trustees Victoria Ltd [2007] NS WSC 694 and Provident Capital Ltd.v. Printing [2008] NSWCA 131 at [22-36].

43. From the evidence produced by the Claimant the Court is satisfied that the Claimant has shown that-

- a) The defendant has mortgaged his leasehold titles as security to the Claimant,
- b) The defendant as mortgagor has defaulted in repayments of his loans as agreed in February 2016,
- c) There was a notice of demand issued by the Claimant to the defendant, and
- d) The notice of demand has not been complied with by the defendant.

44. The case of National Bank of Vanuatu.v. Tambe [2007] VUSC 105 is the relevant case authority in support of the above elements required to be proved by the Claimant.

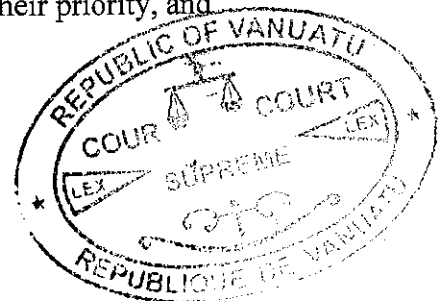
45. I accept the Claimant's submission that the defendant's complaints about interests and what amounts are owing are without merits. The case of ANZ Bank.v. Derek Lulum [2000] VUCA 7 is clear authority for this ruling. Further I accept that the defendant's about breaches of his constitutional rights are also without merit on the authority of the Court of Appeal case of Francois.v.Ozols [1998] VUCA.5. (CC 155/1996).



Conclusion

46. I therefore reject all of the defendant's submissions. On the other hand I accept the submissions of the Claimant and for the reasons, I enter judgment for the Claimant and grant the orders sought as follows:-

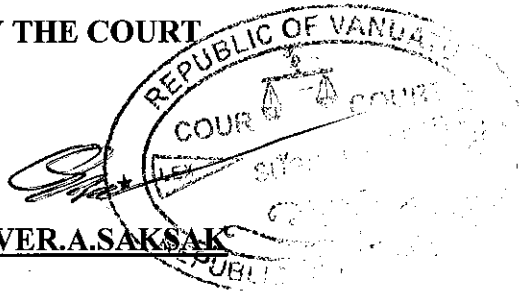
1. That the Claimant, as Mortgagee, be hereby empowered to sell and transfer leasehold property contained and described in lease title numbers 12/0633/767 and 12/0923/181 ("the Properties") by such means and in such manner as it shall deem fit.
2. That pending such sale and transfer the Claimant, as Mortgagee, or any agent or agents duly authorised by it in writing, be empowered to enter on the Properties and act in all respects in the place and on behalf of the proprietor of the leases, and to apply in reduction of the monies due and owing to the Claimant all or any rent received in respect of the said Properties.
3. That the purchase monies to arise from the sale and transfer of the Properties and the monies received (if any) by the Claimant pending such sale and transfer shall be applied:
 - a) Firstly in payment of the expenses occasioned by the sale and transfer or going into and remaining in possession (as the case may be), including the costs of this application,
 - b) Secondly, in payment of the monies then due and owing to the Claimant as Mortgagee,
 - c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in order of their priority, and



- d) Fourthly the surplus (if any) shall be paid into this Honourable Court pending further order.
4. The Defendant gives the Claimant possession of the Properties forthwith.
 5. The Claimant has leave to issue an enforcement warrant (non-money order) in respect of the Properties.
 6. That the Defendant be ordered to pay the costs of and incidental to this suit on the standard basis.

DATED at Port Vila this 6th day of December, 2016

BY THE COURT



OLIVER.A.SAKSAK

Judge