

**BETWEEN: National Bank of Vanuatu
Limited**
Claimant

AND: Marc Ati
Defendant

***Date of Hearing of
Application:*** *27th day of May, 2024*

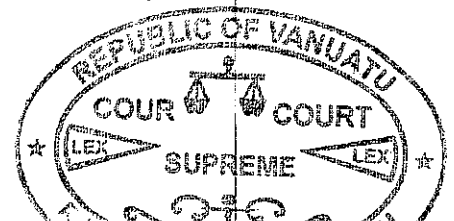
Date of Decision: *28th June 2024*

Before: *Justice E.P. Goldsbrough*

In Attendance: *Fleming, M for the Applicant
Morrison, N for the Respondent to the application*

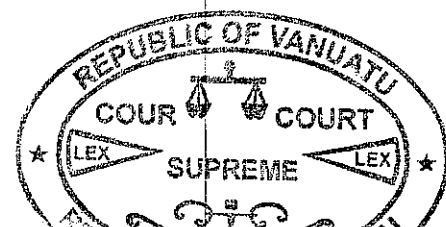
DECISION ON APPLICATION TO STRIKE OUT

1. This is an application to strike out a claim filed on 3 May 2023. The claim is for USD 836,356.32, together with VT 144,236,060. The amount represents the shortfall following the sale of the property, which proceeds were used to reduce the total outstanding debt. This is not the first-time proceedings have been brought to recover under these loans.
2. The documents relied upon by the Applicant, Marc Ati, the defendant in the substantive claim, are the claim filed 3 May 2023, the defence filed 15 June 2023, the application to strike out filed 15 November 2023 together with the sworn statement of the Applicant filed the same day, and two sworn statements of James Tari filed 20 and then 22 March 2024.
3. Counsel filed written submissions on the application for the Applicant. Counsel for the Respondent to the application, claimant in the substantive proceedings, made oral submissions in reply.
4. Beginning in 2011, the Applicant had agreed with the National Bank various loan facilities, eventually requiring security over leasehold property. One security was never



executed on property with a leasehold title 03/OH64/059. That may have been because the property was already mortgaged elsewhere.

5. Other property, which was the subject of security, has been sold but did not realise sufficient to clear the outstanding debt. There is a counterclaim against the claimant bank for negligence arising from the time taken to realise the asset and an alleged failure to maintain the property in the interim.
6. Civil case 2044 of 2020, brought by the same claimant against the Applicant, resulted in a summary judgment against him. The matter was taken on appeal, but by the time of the hearing, the property had already been sold. The appeal was dismissed with an order for costs against the Applicant. During the appeal, the Court was told that the Applicant alleged a sale at an undervalue and that proceedings may be instituted against the bank for that.
7. On 22 March 2021, a Deed of Release and Settlement was executed between the National Bank, Luganville Bay Limited, PITCO and Marc Ati to end Civil Case 2044 of 2020 and the outstanding counterclaim. The deed was described as being in full and final settlement of the case without admitting liability or fault.
8. Following the execution of the Deed, the various parties filed by agreement notices to discontinue both the claim and counterclaim.
9. On 25 March 2022, a further deed was made available by the bank to the same parties as the earlier deed, purporting to vary the terms of the earlier deed. It was executed on the part of the Applicant by counsel, not by the Applicant himself. There is material filed in this application by that counsel purporting to act for the Applicant, who says he was not properly authorised to execute a deed on behalf of his client, and an explanation from that counsel as to what he understood the deed to be about.
10. That evidence raises questions of fact that cannot be determined within an application to strike out. If it were not the case but involving only a simple interpretation of the 1st deed, then a strike out may have been appropriate. As it is not, the application to strike out must be dismissed. For until the status of the second deed is established on evidence, the full picture is not clear.
11. Costs would generally follow the event. However, the matter was neither complex nor long, and counsel for the Respondent to the Application did not even prepare written



submissions on the application but dealt with it summarily. In that event, costs will be costs in the cause.

12. The substantive matter was listed for further directions on the counterclaim, and this decision will be delivered simultaneously.

DATED at Port Vila this 27th day of June 2024

BY THE COURT

E.P. Goldsbrough

E.P. Goldsbrough

Judge of the Supreme Court

