

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

**CIVIL APPEAL NO. 50 OF 2012**

**BETWEEN: SANDRINO H. TRAVERSO**  
*Appellant*

**AND: ANZ BANK (VANUATU) LIMITED**  
*Respondent*

Coram: Hon. Chief Justice Vincent Lunabek  
Hon. Justice John von Doussa  
Hon. Justice Ronald Young  
Hon. Justice Oliver Saksak  
Hon. Justice Daniel Fatiaki  
Hon. Justice Robert Spear  
Hon. Justice Dudley Aru

Counsel: The Appellant in person  
Abel Kalmet for the Respondent

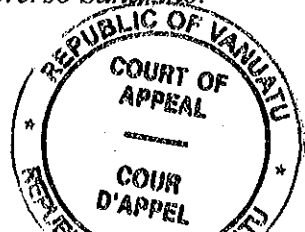
Hearing: 16 & 23 April 2013  
Judgment: 26 April 2013

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**JUDGMENT**

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1. This is an appeal against a summary judgment entered by the Supreme Court on 2 November 2012 effectively empowering the ANZ Bank as mortgagee to exercise its power of sale over leasehold property title 11/OE31/090.
2. Before turning to the points advanced on appeal by Mr Traverso, it is necessary to provide a brief summary of the background to the dealings between the parties. Since at least 2006, Mr Traverso has been a customer of the ANZ Bank both in his personal and his business respects; Mr Traverso's trades in business as *Enterprise Traverso Sandrino*.



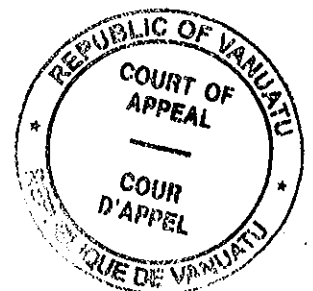
3. In April 2006, Mr Traverso negotiated a loan facility with the ANZ Bank for his business *Enterprise Traverso Sandrino* for the amount of Vt 30,962,000 for the purchase of machinery and materials. The ANZ Bank took security by way of an all undertakings mortgage over leasehold property title 11/OE31/090 and a collateral mortgage over lease title 12/0941/029. The applicable interest rate was 11% per annum.
4. In June 2006, Mr Traverso renegotiated an existing loan facility (798122) with the ANZ Bank by way of an increase of his business's working overdraft limit from Vt 6 million to Vt 11.5 million. The applicable interest rate was 11.5% per annum.
5. In November 2006, Mr Traverso refinanced both his business and personal position with the ANZ Bank both in respect of increasing existing loan facilities and by taking up new loans. The total position then was:-

<i>a. Enterprise Traverso Sandrino</i>		<i>Vatu</i>	
i. Machinery loan	ac 963357	28 833 211	11.0% pa
ii. Property purchase (new)	ac 1060048	17 426 794	11.0% pa
iii. Overdraft limit	ac 798122	6 000 000	11.5% pa
iv. Immigration bond		50 000	

<i>b. Sandrino Traverso (personal)</i>		<i>Vatu</i>	
i. Home loan	ac 923256	12 424 167	9.75% pa
ii. Investment property	ac 1119084	20,000,000	9.25% pa

**Total facility limit Vt 84,734,172**

6. This total loan facility remained secured under the mortgage over lease title 11/OE31/090, the collateral mortgage over lease title 12/0941/029 with further collateral security to be provided by way of mortgage over 3 other properties.



7. Mr Traverso refinanced his loan facilities with the ANZ Bank on 3 further occasions in February 2008, May 2008, and June 2008. As at the last refinancing on 4 June 2008, the total position was as follows:-

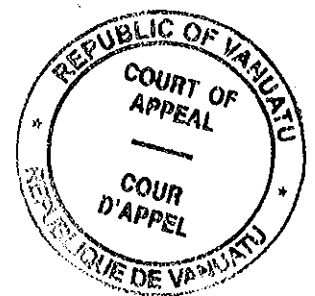
<i>a) Enterprise Traverso Sandrino</i>		<i>Vatu</i>		
A.	Machinery loan	ac 963357	23 969 487	9.5% pa
B.	Property purchase	ac 1060048	17 426 794	9.5% pa
C.	Overdraft limit	ac 798122	70 000 000	9.9% pa
D.	Immigration bonds		420 000	
E.	Foreign currency dealing limit		300 000	

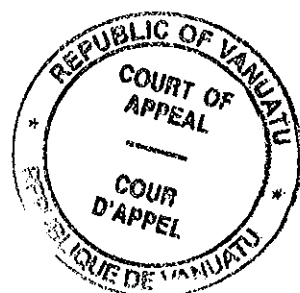
<i>b) Sandrino Traverso (personal)</i>		<i>Vatu</i>		
A.	Home loan	ac 923256	11 643 427	8.25% pa
B.	Investment property	ac 1119084	18 882 003	8.25% pa

**Total facility limit Vt 139,981,206**

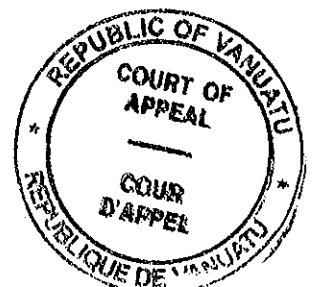
8. Mr Traverso fell into arrears in respect of his repayment obligations resulting in a notice of demand being served on him on or about 22 May 2012 for a total amount of Vt 195,868,741.
9. Mr Traverso then took issue with the calculation of the amount payable to the ANZ Bank and on 27 September 2010 commenced a claim in the Supreme Court (CC 148/10) which challenged the assessment of the debt by particular reference to the interest rate applied in each case. In particular, Mr Traverso asserted that the maximum interest that could be applied was 10% per annum.
10. The defence filed by the ANZ Bank in CC 148/10 is to the effect that the interest calculations were correct. Additionally, the ANZ Bank counterclaimed for judgment for the total amount owing under the various loan facilities to overcome a difficulty that had arisen in respect of the collateral securities.



11. That proceeding (CC 148/10) is continuing before another Judge of the Supreme Court rather than the Judge who dealt with the summary judgment under appeal.
12. The ANZ Bank then commenced a separate proceeding on 1 August 2012 (CC 129/12) against Mr Traverso seeking various orders to permit the ANZ Bank to exercise its power of sale of 11/OE31/090 being the prime security. The defence filed to that claim by Mr Traverso alleged that excessive interest had been charged by the ANZ Bank. Furthermore, that some of the documents relied upon by the bank were forgeries. Mr Traverso applied for this new proceeding (CC 129/12) to be consolidated with the earlier proceeding (CC 148/10).
13. Following the defence being filed in CC 129/12, the ANZ Bank applied for summary judgment on its claim. That application for summary judgment was supported by three sworn statements from Elizabeth David; a Senior Manager with the ANZ Bank in Port Vila.
14. Mr Traverso's application to consolidate the two Supreme Court proceedings and the ANZ Bank's application for summary judgment were dealt with initially by the primary judge (CC129/12) at a conference held on 19 October 2012. The outcome of that conference was a direction from the primary judge that a copy of all the pleadings in CC 148/10 was to be provided by Mr Traverso to the court to assist the court with the issue of consolidation. Mr Traverso was also directed to file a sworn statement setting out "*the reasons why he has an arguable defence*" to the claim. Both interlocutory applications were set down for hearing on Monday 29 October 2012.
15. There was no appearance by or on behalf of the defendant when the matter came on for hearing before the primary judge on 29 October 2012. Furthermore, a copy of the pleadings in CC 148/10 had not been provided nor had there been any evidence filed by Mr Traverso much less evidence explaining why he had an arguable defence to the summary judgment application.

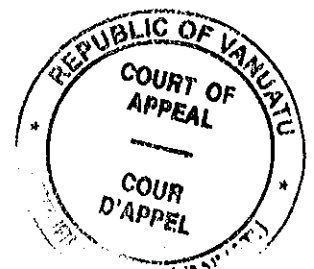


16. Unsurprisingly, the primary judge summarily dismissed Mr Traverso's application for consolidation in the absence of any representation on behalf of the defendant. The court then proceeded to hear the ANZ Bank's application for summary judgment with the outcome that orders were made permitting the ANZ Bank to exercise its power of sale as mortgagee over lease title 11/OE31/090.
17. This appeal challenges the decision of the Supreme Court to enter summary judgment permitting the mortgagee sale to take place.
18. The first stated ground of appeal is a complaint that the hearing of the summary judgment application proceeded in the absence of Mr Traverso and/or his counsel. In his written submissions filed in this court, Mr Traverso records that at approximately 7.00 am on 29 October 2012 (the morning of the hearing of the summary judgment application) he received a phone call from a friend of his lawyer (Mr Napuati) who informed Mr Traverso that Mr Napuati had been taken ill on Tanna and that he would not be able to travel to Port Vila for the hearing. Mr Traverso states that he then went to the Supreme Court Office and passed this information on to the Receptionist who told him that she would inform the judge. Furthermore, when he asked if he should appear in person, he was informed by the Receptionist that it was not necessary as the conference would be postponed.
19. Mr Traverso expressed his surprise, in his submissions, that the primary judge noted in her decision,
- "On 29 October 2012 the defendant and his counsel Mr John Less Napuati, were absent and there is no reasonable and/or any excuse or explanation for the defendant's absence or the absence of his counsel."*
20. There has been no evidence filed that supports Mr Traverso's account of events. However, accepting for the moment that the account is correct and that Mr Napuati was indisposed and unable to attend Court, the issue still remains whether there was any material before the primary judge that disclosed a reasonable defence to the claim irrespective of whether there was an appearance or not. As mentioned, Mr Traverso was



required to file a sworn statement with his explanation as to why he had a reasonable defence to the claim. No such sworn statement or indeed any other material to that end was filed prior to the hearing of the summary judgment application.

21. On 15 April 2013, at the first call of this appeal, the court emphasised to Mr Traverso that his appeal may depend on his ability to satisfy the court that he had a reasonable defence to the claim for which summary judgment had been sought. It was further indicated that while it may have been unfortunate that there was no representation at the summary judgment hearing, for whatever reason, it would be quite wrong to allow the appeal solely on that basis unless the Court was also satisfied that Mr Traverso had a reasonable defence to the claim.
22. The appeal came on for hearing on 16 April 2013. Mr Traverso indicated that his defence to the claim related to the calculation of interest charged on the various loan facilities that he had taken with the ANZ Bank. Mr Traverso stated that he believed the bank was not entitled to charge interest above 10% per annum on any of the loan facilities because the loan contracts were governed by French law and that the ANZ Bank had agreed not to charge interest at more than 10% per annum..
23. Mr Traverso acknowledged that he did not dispute that he had borrowed a substantial amount from the ANZ Bank that he estimated was now in the vicinity of Vt 90 million.
24. The appeal hearing on 16 April 2013 was eventually adjourned through to 23 April 2013 to enable Mr Traverso to discuss matters with counsel for the ANZ Bank in the hope that some commercial resolution could be achieved.
25. When the matter returned on 23 April 2013, Mr Kalmet for the ANZ Bank informed the Court that, while there had been discussions, no resolution had been achieved.
26. By this time, the court had also seen a sworn statement filed for the ANZ Bank in CC 48/10 from Roger Jenkins, an accountant at Port Vila. Mr Jenkins had been instructed by the ANZ Bank to conduct an independent review of the calculation of interest on the various accounts held by Mr Traverso. In accordance with the various



loan agreements between the ANZ Bank and Mr Traverso, interest was to be calculated daily and charged monthly and that was the approach taken by Mr Jenkins. While that case (cc 148/10) is ongoing, it is not without significance to the issues before us that Mr Jenkins concluded that the interest charges made by the ANZ Bank were, ..." *all essentially in accordance with the terms specified in the various Letters of Offer*".

27. Mr Jenkins was also instructed to conduct a re-calculation of the various balances by applying a rate of 13.5% per annum to the business loans and 10.5 % pa to the personal loans without consideration of any penalty rates that might have been applied from time to time by the ANZ Bank. Mr Jenkins' summary of the balances calculated as at 31 July 2012 was:

a)	Total balance as per bank statements	Vt 203 376 178
b)	Recalculated by Mr Jenkins per loan facility documentation	Vt 199 608 757
c)	Recalculated by Mr Jenkins applying 13.5% per annum to the business loans / 10.5 % per annum to the personal loans	Vt 173 988 579

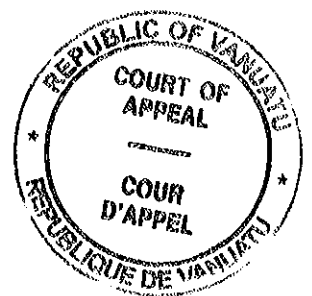
28. It is abundantly clear to us that Mr Traverso had no basis for opposing the entry of summary judgment whether he appeared or not at the hearing of the summary judgment application. Mr Traverso acknowledged that he owes at least Vt 90 million to the ANZ Bank. The final debt may be significantly in excess of that figure. Additionally, the leasehold property 11/OE31/090 that the ANZ Bank seeks to sell is understood by both Mr Traverso and the ANZ Bank to be worth between Vt 40 million and Vt 50 million. Accordingly, even if Mr Traverso is correct in all his assertions as to the amount that he owes to the ANZ Bank (which we doubt), his acknowledged indebtedness to the ANZ Bank is for far more than the sale of the subject property will likely return.

29. It is well established that a mortgagee's power of sale cannot be defeated simply by raising a challenge to the interest calculations – see *ANZ Bank (Vanuatu) Ltd v. Lulum*<sup>1</sup> and *Brunet v. Westpac Banking Corporation*<sup>2</sup>.

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<sup>1</sup> [2000] VUSA 7

<sup>2</sup> [2006] VUSA 11



30. The primary judge also noted with approval the oft cited extract from Halsbury's Laws of England when she said,

*"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the mortgagor objects to the manner in which the sale has been arranged. He will be restrained, however, if the mortgagor paid the amount claimed into Court, that is, the amount which the mortgagee swears to be due to him, unless, on the terms of the mortgage, the Claim is excessive."*

31. The primary judge summarised the position, correctly in our view, in paragraphs 24, 26 and 27 of her judgment:-

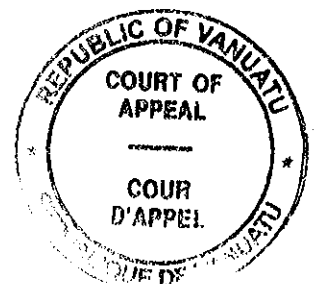
*"24. What the Claimant is praying the Court for in this present application is for the exercise of powers of sale by a mortgagee. Judging from all the facts before me, I find that the defendant has granted a mortgage of his property to the claimant, that the mortgage is in default, that notice of demand has been served on the mortgagor and that the notice of demand has not been complied with and the mortgage remains in default.*

.....

*26. In this present case, I am equally satisfied that the Claimant has proven all of the elements by the Sworn Statements of Elizabeth David for the Claimant filed on 1 August 2012 and 21 September 2012 respectively as well as the Further Sworn Statement of Elizabeth David in support of Application for Summary Judgment filed on 25 October 2012.*

*27. Accordingly, I do consider that this is a case where the defendant has no real prospect of defending the claim and there is no need for a trial of it. It is in light of all the foregoing that I would uphold counsel's submissions and grant the Order for summary judgment as prayed for by the Claimant."*

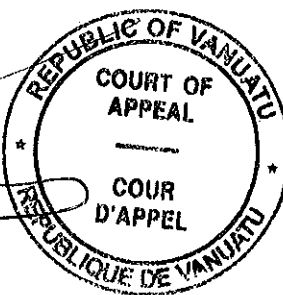
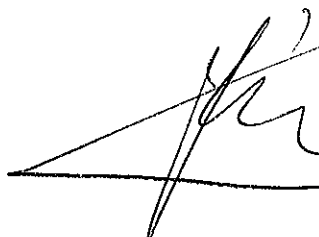
32. We are unable, with respect, to find any fault with the reasoning adopted or the approach taken by the primary judge in the Supreme Court. Indeed, it must be said that the outcome was inevitable for the reasons we have given.





33. Mr Traverso can still continue with his challenge to the ANZ Bank's assessment of his debt to it within the other Supreme Court proceeding (CC148/10). However, whatever might be the eventual outcome of that case, there is nothing raised there by Mr Traverso that could or should be permitted to stop the ANZ Bank at this stage ameliorating its financial exposure to Mr Traverso by realising what security it currently has available to it.
34. For these reasons, the appeal is dismissed with costs to the ANZ Bank to be agreed or taxed.

**FOR THE COURT**

The seal is circular with a double border. The outer border contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom, separated by two small stars. The inner circle contains the text "COURT OF APPEAL" at the top and "COUR D'APPEL" at the bottom, with a horizontal line between them.

**Hon. Chief Justice V. LUNABEK**