

(Civil Jurisdiction)

IN THE MATTER OF : A Mortgage dated  
27th day of  
November 1985

AND

IN THE MATTER OF : The Land Leases Act  
1983 (CAP 163)

**BETWEEN :** THE BANQUE d'HAWAI  
(VANUATU) LIMITED a Bank duly  
registered in the Republic of  
Vanuatu and having its established  
places of business at Port-Vila, Efate  
in the Republic of Vanuatu  
**Plaintiff**

**AND:** SECURITY TRUSTEES LTD  
of 2nd Floor, Law House, Port-Vila,  
Efate in the Republic of Vanuatu  
**Defendant**

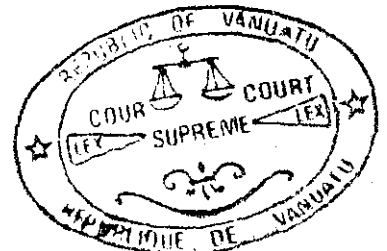
**Coram :** Before Mr. Justice Oliver A. SAKSAK in Chambers  
**Mr. John Malcolm - Appearing for the Plaintiff**  
**Mr. George Vasaris - Appearing for the Defendant**

### JUDGMENT

By way of background information, this Matter came initially before this Court by way of an Originating Summons filed by Counsel for the Plaintiff on 17th February 1997. An Affidavit in support of the various Orders sought in the Originating Summons sworn by Mr. Mark Joseph was also filed on the same day. The Originating Summons was filed pursuant to order 57, Rules 4 and 18 of the High Court (Civil Procedure) Rules 1964.

Counsel for the Plaintiff further took out a Summons filed the 17th day of February 1997 and returnable on Wednesday 28th May 1997 at 9 o'clock in the forenoon in which he sought the following Orders :-

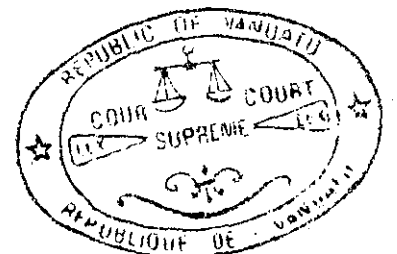
1. FOR an Order that the Plaintiff as Mortgagee, be empowered to sell and transfer the Leasehold Property contained and described in Title No.11/OE22/010 by such means and in such manner as it shall deem fit.



2. FOR an Order that pending any such Sale and Transfer the Plaintiff as Mortgagee or any agent or agents duly authorised by it in writing be empowered to enter on the said Leasehold Property and in all respect 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 Plaintiff all or any rent received in respect to the said property.
3. FOR an Order that the purchase monies to arise from the Sale and Transfer of the Leasehold Property and the monies received (if any) by the Plaintiff pending such Sale and Transfer be applied :
  - (a) Firstly in payment of the expenses occasion by the Sale and Transfer or going into an 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 Plaintiff as Mortgagee ;
  - (c) Thirdly in payment of subsequent registered Mortgages or encumbrances (if any) in order of their property ;
  - (d) Fourthly the surplus (if any) shall be paid into this Honourable Court pending further Order.
4. FOR such further or other relief as shall be just.
5. THAT the Defendant may be ordered to pay the costs of this application.

#### PARTICULARS

1. By a Mortgage dated the 27th day of November, 1985, the Defendant mortgaged to the plaintiff all her interest as registered proprietor in the lease comprised and described in Title NO.11/OE22/010 to secure the repayment of all monies due and owing by the said SECURITY TRUSTEES LTD to the Plaintiff.
2. The said Mortgage was duly stamped and was registered in accordance with the provisions of the Land Leases Act 1983 on the 6th day of December, 1985.
3. The Plaintiff has demanded from the Defendant of all sums owing and outstanding and the Defendant has not paid the amount outstanding.



Mr. Malcolm for the Plaintiff told the Court that the position was as outlined in the Affidavit of Mr. Mark Joseph sworn on 7th February, 1997. Firstly Mr. Joseph deposes to the fact that he is the General Manager of the Port-Vila Branch of the Plaintiff Bank and as such that he is duly authorised to swear the Affidavit on behalf of the Plaintiff. Further, that he was responsible for the day to day contact and carriage of the matter before the Court.

- Secondly Mr. Joseph referred to a Mortgage dated the 27th day of November, 1985 and annexed a copy of the said Mortgage as Annexure "A". The
- Mortgage is between the BANK INDOSUEZ VANUATU S.A. and the Defendant. The Plaintiff alleges breach of repayment terms under the Mortgage.

Thirdly Mr Joseph deposes that the Plaintiff had assumed the rights and liabilities of the of the said BANQUE INDOSUEZ VANUATU S.A. by sale or purchase. There was no further documentary evidence to prove the sale.

Fourthly Mr Joseph deposes that the Defendant owed and still owes to the Plaintiff the sum of VT. 7.694.554. A Demand was served in accordance with the terms of the Mortgage and a letter to that effect was annexed marked "B".

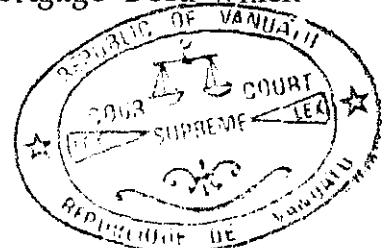
- Finally Mr Joseph deposes to the fact that the sum of VT. 4.326.311 was outstanding from the Defendant as at 15th January 1997 and produces a Bank Statement marked "C" to prove that amount. Records from the Lands
- Records Office show that leasehold over title 11/OE22/010 was transferred by Tru Van Qua to Security Trustees Limited, the Defendant herein, with a Mortgage in favour of BANQUE INDOSUEZ VANUATU S.A. as Mortgagee. This document was annexed marked "D" in the Affidavit of Mr Joseph. Mr Malcolm argued that because the Mortgage Deed was signed, sealed and registered at the Lands Records Office and that there was breach of repayment terms, the Court should grant the Orders sought.

Mr. Vasaris for the Defendant argued that the Court could not proceed with the application and that it should be struck out. He argued three alternative ways.

- (a) That the Plaintiff as the Bank had no standing ;
- (b) That there was lack of jurisdiction in the Court ;
- (c) That there was no reasonable cause of action.

Mr Vasaris referred to the Mortgage Deed marked "A" in the Affidavit of Mr Mark Joseph and submitted that the Mortgage Deed was between SECURITY TRUSTEES LIMITED (the Defendant) as Mortgagor and BANQUE INDOSUEZ VANUATU S.A., as Mortgagee and that this Bank only was the registered Mortgagee.

He further referred the Court to Clause 21 of the Mortgage Deed which reads:-



"21. Governing Law

*It is expressly agreed that this Mortgage and all matters arising hereunder shall be governed by English Law as applicable in the Republic of Vanuatu subject however to the Constitution and subject also to any relevant laws of Vanuatu (whether relating to land, land tenure, land registration, Mortgages or otherwise) which shall prevail in the event of conflict or in consistency. This Deed shall be justiciable before the Supreme Court of Vanuatu".*

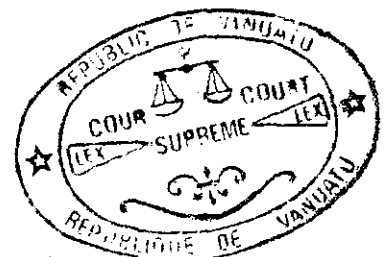
Mr Vasaris referred the Court also to Part VIII of the Land Leases Act 1983 (CAP 163) in particular Section 52 which reads :-

- "51. (1) *A proprietor may by an instrument issue prescribed form, mortgage his registered lease to secure the payment of an existing or a future or contingent debt or other money or money's worth.*
- (2) *The Mortgage shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as the Mortgagee and by filing the instrument.*
- (3) *A Mortgage shall not operate as a transfer but shall have effect as a security only."*

Mr Vasaris then referred the Court to Section 59 of the Act which reads :-

"ENFORCEMENT OF MORTGAGES

59. (1) *Except as provided in Section 46 a Mortgage shall be enforced upon application to the Court and not otherwise.*
- (2) *Upon any such application, the Court may make and order -*
- (a) *empowering the mortgagee or any other specified person to sell and transfer the mortgaged lease, and providing for the manner in which the sale is to be effected and the proceeds of the sale applied;*
- (b) *empowering the mortgagee or any other specified person to enter on the land and act in all respects on the place and on behalf of the proprietor of the lease for a specified period and providing for the application of any moneys received by him while so acting; or*
- (c) *vesting the lease in the mortgagee or any other person either absolutely or upon such terms as it thinks fit but such order shall, subject to subsection (5), not take effect until registration thereof.*



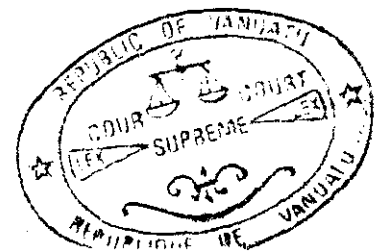
- (3) *The Court shall, in exercising its jurisdiction under this section, take into consideration any action brought under section 58 and the results thereof.*
- (4) *After the Court has made an order under paragraphs (a) or (c) of subsection (2) or while an order under paragraph (b) of subsection (2) is in force, no action may be commenced or judgement obtained under section 58 in respect of the mortgage except with the leave of the Court and subject to such conditions (if any) as the Court may impose.*
- (5) *Any order made by the Court under this section shall for the purposes of subsection (4) be effective from the time when it is made.*

Counsel for the Defendant then submitted that a mortgage must exist and be registered under the provisions of section 51 of the Act before a proprietor can invoke the jurisdiction of the Court under Section 59 of the Act to enforce the mortgage. Further, Mr Vasaris submitted that in the present case the only person who can come before this Court is the Banque Indosuez Vanuatu S.A being the registered mortgagee and not the Banque d'Hawaii (Vanuatu) Limited. I accept the arguments and submissions of Mr Vasaris entirely.

The only documents available in evidence before this Court are:

- a) The Mortgage deed dated 27th November 1997 marked "A". It is clear from that document that the Mortgagor is SECURITY TRUSTEES LTD (the Defendant) and the BANQUE INDOSUEZ VANUATU S.A. It is also clear that this Mortgage Deed was registered because there is a certificate to that effect at the very end of the Mortgage Deed was registered on 26th March 1986 at 9.30 hours. It bears the stamp of the Land Records Office.
- b) Letter of Demand dated 27th January 1997 marked "B";
- c) Financial statement dated 15th January 1997 marked "C";
- d) Advice of Registration of Dealing from the Lands Records Office dated 26th March, 1986 marked "D". This document reveals a transfer of lease dated 27th November 1985 between TRU VAN QUA and SECURITY TRUSTEES LIMITED (Defendant). Secondly it reveals that a mortgage is in existence and the Mortgage is BANQUE INDOSUEZ VANUATU. This mortgage is dated 27th November 1985. I take that document as that marked "A" in the Affidavit of Mr Mark Joseph.

It is therefore clear to me that under the provisions of Section 51 of the Land Leases Act 1983 (CAP. 163) the only registered Mortgagee under a valid and existing Mortgage Deed is the BANQUE INDOSUEZ VANUATU S.A.



I therefore rule that the BANQUE d'HAWAII (VANUATU) LIMITED being the Plaintiff herein, has no standing to bring the action he has taken before this Court.

Mr. Vasaris argued further on the aspect of transfer and referred the Court to Section 60 of the Act which reads :-

*"TRANSFER*

60. (1) *A proprietor may, subject to the provisions of this Act, transfer his registered lease or mortgage to any person, with or without consideration, by an instrument in the prescribed form.*
- (2) *The transfer shall be completed by registration of the transferee as proprietor of the lease or mortgage and by filing the instrument.*
- (3) *A transfer shall dispose of the registered lease or mortgage transferred for the whole remaining portion (at the time when the disposition purports to take effect) of the period for which the lease or mortgage was registered."*

He refers further to Section 63 of the Act which reads:-

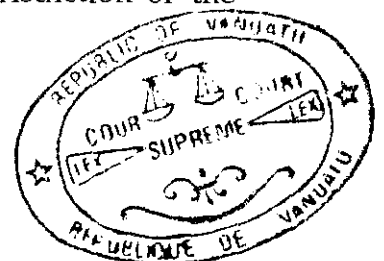
- "63. Upon registration to Section 63 of a transfer of a Mortgage, the transferee shall be entitled to all of the rights, powers and remedies of the Mortgagee expressed or implied in the Mortgage in including the right to recover any debt, sum of money or damages thereunder, and all the interest of the transferor in any such debt, sum of money or damages, shall vest in the transferee".*

The prescribed form required to effect transfers under Section 60 of the Act is L.R. Form 12.

Mr Vasaris then submitted that unless and until such a transfer of Mortgage is registered against the subject lease, it was premature for the Bank of Hawaii as Plaintiff to seek to invoke the jurisdiction of the Court.

He argues further that in the Originating Summons the Plaintiff is named as the Bank of Hawaii and that this was clearly incorrect and could not be in compliance with the provisions of the Land Leases Act as regards Mortgages. Mr Vasaris refers to Order 1 seeking power to sell and transfer the Leasehold Property contained and described in Title No. 11/OE22/010. The Plaintiff was neither a transferee because there was no instrument of transfer before the Court.

Mr Vasaris therefore submitted that the Plaintiff being the Bank of Hawaii had no standing and therefore it could not invoke the jurisdiction of the Court under Section 59 to enforce the Mortgage.



I accept Mr Vasaris' submissions. I have already ruled that the BANQUE d'HAWAII (VANUATU) LIMITED as Plaintiff has no standing. In the absence of an Instrument of Transfer showing that the property, the subject of the Mortgage Deed before the Court has been transferred by the BANQUE d'HAWAII (VANUATU) LIMITED as is clearly required by the legal provisions of the Land Leases Act which this Court has been referred to, I now rule that the BANQUE d'HAWAII (VANUATU) LIMITED and any other person, body corporate or otherwise, who being the proprietor of an unregistered mortgage or an unregistered instrument of transfer cannot invoke the jurisdiction of the Court under Section 59 of the Land Leases Act 1983 to enforce the provisions of their Mortgage.

Finally Mr Vasaris referred the Court to the definition of the term "Mortgagee" under Clause 22(e) of the Mortgage Deed which reads:-

*"(e) The expression "the Mortgagee" shall include the successors assigns and transferees of the Mortgagee and all persons deriving title under the Mortgage."*

Mr Vasaris argues that this was made in contemplation of a Mortgage being transferred from one Mortgagee to another and this could only be done by complying strictly with the paramount provisions of the Land Leases Act 1983.

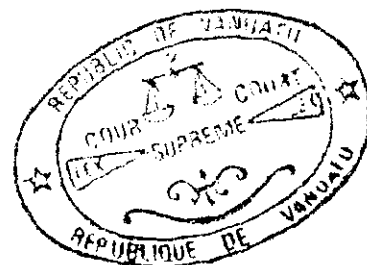
- Mr Malcolm for the Plaintiff Bank argued that because a sale had been made, an assignment was made and therefore fell within the definition of the term "Mortgagee" under Clause 22(e). I do not agree with Mr Malcolm.

It is my view that "assigns" here used must mean a legal assign. See Matthews v. Usher, (1900) 2 Q.B. 535, C.A., per A.L. Smith, L.J., at p. 537.

Mr Mark Joseph states in paragraph 3 of this Affidavit that on or about December, 1993 the Plaintiff assumed the rights and liabilities of the said BANQUE INDOSUEZ VANUATU S.A. by sale and purchase. There is no further documentary proof of this and therefore it cannot be admitted. But even if it were true that sale has taken place, it cannot be an assignment under clause 22(e) of the Mortgage because that sale whether actual or not has not affected, changed or modified the Records held by or in the Land Records Office. The Records clearly reveal that the Mortgagee is still the BANQUE INDOSUEZ VANUATU S.A.

To make it a legal assign the provisions of Part III and Part IV of the Land Leases Act had to be complied with. I am not satisfied that the Plaintiff Bank here has complied with those provisions in this case.

I therefore rule that the Plaintiff Bank in Civil Case No. 10 of 1997 has no reasonable cause of action to enable it to apply to this Court for the Orders sought.




For those reasons the Court hereby makes the following Orders:-

- (1) THAT the Originating Summons filed on the 17th day of February 1997 by Counsel on behalf of the Plaintiff is struck out ;
- (2) THAT the Summons filed on 17th day of February 1997 seeking the Orders under the said Originating Summons is dismissed ;
- (3) THAT the costs are awarded to the Defendant to be taxed if not agreed.

DATED AT PORT-VILA THIS 28th DAY OF MAY 1997

BY ORDER OF THE COURT

  
.....  
OLIVER A. SAKSAK  
Judge of the Supreme Court

