

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

**Civil Case No. 129/2012**

**IN THE MATTER** of a Mortgage (Collateral) dated 8 June 2004  
over leasehold title no. 11/OE31/090

**IN THE MATTER** of the Land Leases Act [CAP. 163], as  
amended

**BETWEEN:**           **ANZ BANK (VANUATU) LIMITED**, a  
local company registered in Vanuatu and  
having its head office in the Republic of  
Vanuatu situate at ANZ House, Lini  
Highway, Port Vila, Efate in the Republic of  
Vanuatu.  
Claimant

**AND:**               **SANDRINO TRAVERSO** of P O Box 23,  
Port Vila, Efate in the Republic of Vanuatu.  
Defendant

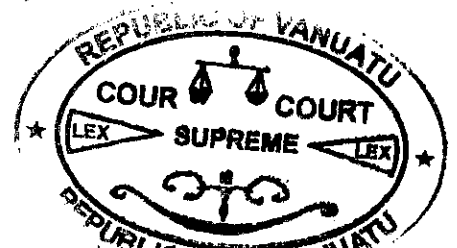
Coram: Justice Mary Sey

Counsel: ~~M. M. H. [REDACTED]~~  
No appearance for the Defendant

Date of Hearing: 29 October 2012  
Date of Decision: 2 November 2012

**JUDGMENT**

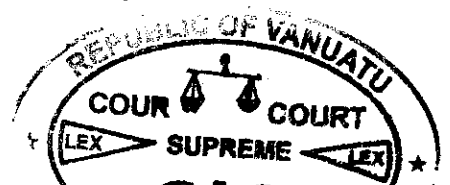
1. This is an application for Summary Judgment filed on 2 September 2012 against the Defendant named herein.
2. In support of the application, the Claimant relies on the following pleadings and evidence:
  - a) Supreme Court claim filed on 1 August 2012;



- b) Sworn Statement of Elizabeth David for the Claimant filed on 1 August 2012;
- c) Sworn Statement of Elizabeth David in support of Application for Summary Judgment filed on 21 September 2012; and
- d) Further Sworn Statement of Elizabeth David in support of Application for Summary Judgment filed on 25 October 2012.

**Preliminary matters**

3. By an application dated the 14th day of August 2012, the Defendant applied for an Order that proceedings in Civil Case No. 129 of 2012 be joined with Civil Case No. 148 of 2010; or in the alternative, that proceedings in both cases be consolidated.
4. Civil Case No. 129 of 2012 was listed before me for Conference in Chambers on Friday 19th day of October 2012 at 9.00am. Mr Mark Hurley appeared for the Claimant and Mr John Less Napuati for the Defendant.
5. I record that upon hearing both counsel I made an Order that all pleadings in Civil Case No. 148 of 2010 are to be provided for the Court, by the Defendant within 7 days from the date of the Order, to enable the Court assess the issue of consolidation.
6. I also record that the Defendant was to file a sworn statement setting out the reasons why he has an arguable defence. Furthermore, I record that I made an Order that both the application for joinder and the application for summary judgment will be heard on Monday 29th October 2012 at 9.00am. However, it is pertinent to note that the Defendant has not filed any Sworn Statements in response to the Claimant's application for Summary Judgment despite paragraph 2 of the Court's Orders of 19 October 2012.
7. On 29th October 2012, the Defendant and his counsel, Mr John Less Napuati, were absent and there was no reasonable and/or any excuse or explanation for the defendant's absence or the absence of his counsel.
8. Thereupon the Court dismissed the Defendant's application for consolidation and then proceeded to hear the Claimant's application for Summary Judgment.
9. I deem it apposite at this juncture to chronicle the background facts in

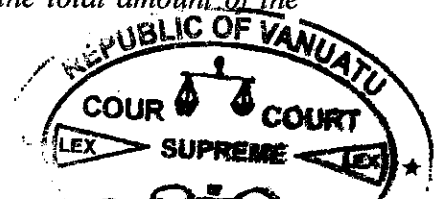


order to place the reader in a position to understand the substratum of this application.

### **Background**

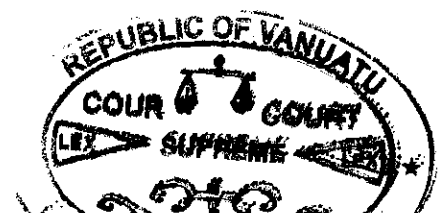
10. In paragraphs 5 - 16 of the Claimant's statements of the case filed on the 1st day of August 2012, the Claimant alleges, inter alia, that:

5. *By the Claimant's letter of offer dated 20 April 2006 to the Defendant, signed and acknowledged by the Defendant on 21 April 2006, the Claimant agreed and did advance in total sum of VT30,962,000 to the Defendant with conditions for the purpose of purchasing machinery and materials from offshore in line with business development ("the First Loan Agreement").*
6. *As part of the security for the Defendant's obligations pursuant to the terms of the First Loan Agreement, the Defendant agreed to and provided to the Claimant a Collateral Mortgage dated 8 June 2004 made between the Claimant as Mortgagee and the Defendant as Mortgagor ("the Mortgage"), in respect of the Property.*
7. *The Mortgage was duly stamped and registered in accordance with the provisions of the Land Lease Act [CAP 163], as amended, on 30 January 2007.*
8. *The Claimant and the Defendant did enter into subsequent Loan Agreements at various dates, whereby the Claimant did provide additional funds increasing the Defendant's indebtedness, for purposes of various facilities, inter alia increasing his borrowings and indebtedness to the Claimant. These Loan Agreements were all conditional upon security being the existing Mortgage including a collateral registered mortgage over lease title 12/0941/029 as Collateral to the Mortgage, in favour of the Claimant over the Property.*
9. *By the Claimant's final letter of offer dated 4 June 2008 ("the Final Loan Agreement") to the Defendant, signed and acknowledged by the Defendant also on 4 June 2008, the Claimant agreed with conditions to provide further advances for purposes of various facilities approved in favour of the Defendant, bringing the total amount of the*



*sums advanced to VT39,981,206. Amongst other conditions, it was an express term of the Final Loan Agreement that security included the existing Mortgage over the Property, to be upstamped and varied to reflect the further advances balance.*

10. *As part of the security for the Defendant's obligations pursuant to the terms of the Final Loan Agreement, the Defendant agreed to and provided to the Claimant a Variation of Mortgage dated 16 October 2009 made between the Claimant as Mortgagee and the Defendant as Mortgagor ("the Variation of Mortgage"), in respect of the Property.*
11. *That the Variation of the Mortgage was duly stamped and registered in accordance with the provisions of the Land Lease Act, as amended on 25 November 2010.*
12. *That it was an express term of the Mortgage referred to in paragraph 6 above that the Defendant would pay the Claimant or otherwise discharge all monies secured by and due and owing under the Mortgage, upon demand in writing.*
13. *That it was a further term of the Mortgage that failure in the Defendant's obligation to repay the monies demanded by the Claimant there under gave rise to the Claimant's power of sale.*
14. *That on 28 May 2012, the Claimant served a Notice of Demand on the Defendant dated 22 May 2012 requiring repayment of all monies and liabilities owing by him to the Claimant and which are secured by the Mortgage.*
15. *That the Defendant has breached and remains in breach of the terms of the Mortgage pleaded in paragraph 12 above, having failed to comply with the said Notice of Demand to settle all monies due and owing to the Claimant.*
16. *That in the premises and consequent upon the Defendant's said breaches, the Claimant is entitled to exercise its rights pursuant to the Mortgage, subject to the sanction of this Honourable Court pursuant to section 59 of the Land Lease Act [Cap 163], as amended.*



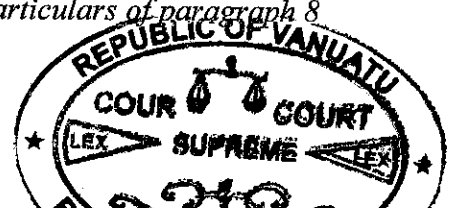
11. The Defendant filed a Defence on 12 September 2012. For ease of reference, I deem it expedient to reproduce paragraphs 2 - 7 hereunder. They read as follows:

- "2. *As to Paragraph 5 of the Claimant's claim, the defendant says that he was only provided with a form entitled "acceptance of offer" he did sign on the 21 April 2006. The claimant offer was verbal.*
3. *In response to paragraphs 6, 7 and 8, the defendant says that:*
- a) *It was the claimant who, at all relevant times, has incited the defendant to borrow money (hereinafter referred to as "the money")*
  - b) *The defendant will refer to the following evidence filed in Supreme Court Civil Case No. 148 of 2010 which is pending before Hon. Justice D. Fatiaki. Ref: annexure 1 to 47 of the defendant witness Mr David Schewenke.*
4. *The money was secured by the claimant through two mortgages:*
- a) *The title No. 12/0941/029 ( Teouma Land) owned by the defendant was sold with the consent of the claimant and the money resulting of the sale was paid to the bank.*
  - b) *The title No. 11OE31/090 which is also put on sale by the defendant but the sale is on hold awaiting the Court decision in CC 148 of 2010 about the amount of interests which was blatantly overcharged by the claimant.*
  - c) *The overcharged interests were processed by the claimant through forged documents.*

Particulars

*Sworn statement of Sandrino Traverso dated 03/10/2011 and 07/11/2011 in Supreme Court Civil Case No. 148 of 2010.*

- d) *In any circumstances, the "loan agreements" the claimant is referring to in the particulars of paragraph 8*



of its claim are disputed in CC 148 of 2010.

5. *As to paragraphs 9 to 16 of the claimant's claim, the defendant repeats paragraph 3 (including particulars) of his defence.*
6. *The claims are made by ANZ Bank in page 4 of its statement of claim in this case were already made in CC 148 of 2010 by the same party.*

Particulars

*The claimant is using the "strategy of forum shopping"*

7. *The defendant respectfully contends that the claimant is attempting to abuse the religion of the Court while requesting something which is already before the same jurisdiction.*

*This is why the defendant has already filed an application for this case to be joined and consolidated with the current existing case in CC 148 of 2010 opposing the same parties for the same purpose."*

**Applicable principles for summary judgment**

12. The principles relevant to an application for summary judgment are clearly stated in **Rule 9.6 (7) of the Civil Procedure Rules No. 49 of 2002** which provides as follows:

*"(7) If the Court is satisfied that:*

*(a) the defendant has no real prospect of defending the claimant's claim or part of the claim; and*

*(b) there is no need for a trial of the claim or part of the claim,*

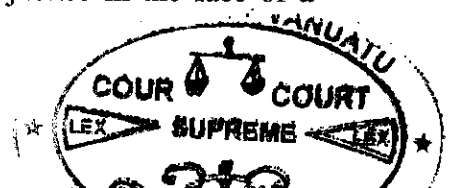
*the court may:*

*(c) give judgment for the claimant for the claim or part of the claim;*

*and*

*(d) make any other orders the court thinks appropriate."*

13. It is now judicially settled that the summary judgment procedure is designed to enable a Claimant obtain swift judgment in respect of his claim against a Defendant who has no real prospect of defending the Claimant's claim or part of it. By its characteristic features, summary judgment is generally viewed as literally shutting the door of justice in the face of a



Defendant in that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice.

14. Consequently summary judgment should be resorted to and accorded only where the Claimant can establish his claim clearly and the Defendant fails to set up a bonafide defence. It is my considered view that, whilst on the one hand the Court wishes to assist a Claimant whose right to relief is being stalled by the delaying tactics of a Defendant who has no defence, on the other hand, the Court is reluctant to deprive the Defendant of his normal right to defend except in a clear case.
15. In **National Bank of Vanuatu v Tambe [2007] VUSC**, Tuohy J. applied **Rule 9.6 (7) of the Civil Procedure Rules** in relation to an application for summary judgment in power of sale proceedings. At paragraph 4 therein of the said judgment, Touhy J stated as follows:

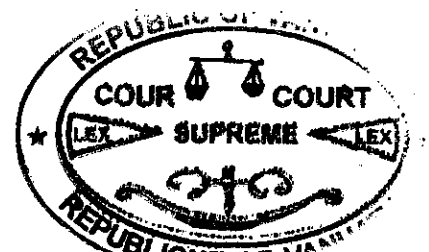
*"4. R .9.6(7) provides that if the Court is satisfied that:*

- a. the defendant has no real prospect of defending the Claimant's claim; and*
- b. there is no need for trial of the claim the Court may give judgment for the claimant."*

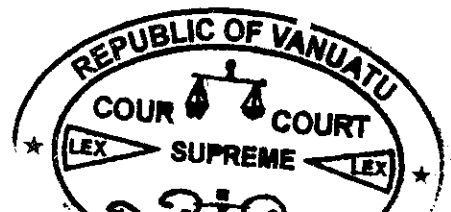
16. His Lordship Tuohy J then went on to consider what is required for the exercise of powers of sale by a mortgagee and at paragraph 5 therein of the said judgment, His Lordship stated as follows :

*"This claim is for the exercise of powers of sale by a mortgagee. It is in standard form. What must be established is:*

- i. that the defendant has granted a mortgage of his property to the claimant*
- ii. that the mortgage is in default*
- iii. that notice of demand has been served on the mortgagor*
- iv that the notice of demand has not been complied with and the mortgage remains in default."*



17. In this present application before me, the Claimant believes that the defendant has no real prospect of defending the Applicant's claim because:
- a) the Defence filed on 12 September 2012 does not disclose any reasonably arguable defence to the Claimant's action for power of sale orders over title no. 11/OE31/090;
  - b) the Defendant does not deny that monies were advanced to him as secured by the Mortgage (Collateral) dated 8 June 2004 (" the mortgage") over leasehold title no. 11/OE31/090;
  - c) the Defendant does not deny that he signed either the Mortgage or the variation of it;
  - d) it is not a defence to a claim for mortgagee power of sale orders to allege the overcharging of interest: **ANZ Bank (Vanuatu) Limited v Lulum [2000] VUCA 7** and **Brunet v Westpac Banking Corporation [2006] VUCA 11**.
18. It appears to me from the defence filed that the Defendant does not deny that he has had the benefit of the sums claimed. In response to paragraphs 6, 7 and 8 of the Claimant's statements of the case, the defendant states in paragraph 3 of his Defence that "it was the Claimant who, at all relevant times, has incited the defendant to borrow money (hereinafter referred to as "the money.")
19. I have also considered the Defendant's assertion, in paragraph 2 of the Defence, that the Claimant's offer was verbal and that he was only provided with a form entitled "acceptance of offer" which he did sign on 21 April 2006. I find this untenable in light of the averments in paragraphs 7 and 8 and the attachments thereto of the sworn statement of David Schwenke filed on 1 December 2011 in civil Case No.148 of 2010.
20. In my opinion, the terms and conditions of any verbal offer by the Claimant were set out in its letter of offer dated 20 April 2006.
21. Furthermore, it seems to me that the Defendant is not disputing the amount that he borrowed from the Claimant. What he seems to be disputing is the applied accrued interest including the rate and the bank fees.





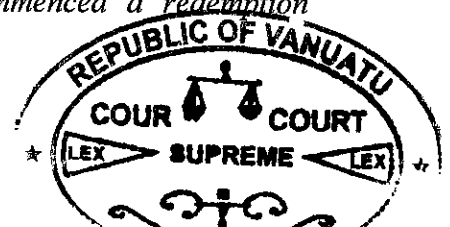
22. Regrettably, as was stated by the Court of Appeal of Vanuatu in **ANZ Bank (Vanuatu) Ltd v Lulum** [2000] VUCA 7, it is not a question of commercial fairness or reasonableness. The Court has no power to depart from the terms of the contract made between the Claimant and Defendant as mortgagee and mortgagor. The Court has no power to do what might be considered "*fair and reasonable*".
23. The Court went on to state in **Lulum** that on neither score is the Court entitled to refuse the grant of an order for the enforcement of a mortgage under **Section 59(2)** of the Land Leases Act [Cap 163]. "*If we may say so, the legal position is not dissimilar to that prevailing in an application by a mortgagor for an injunction to restrain the exercise by the mortgagee of a 'power of sale' where 'the general rule has long been established, ..., that such an injunction will not be granted unless the amount of the mortgage debt, if this is not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court'*: per **Walsh J** in **Inglis v Commonwealth Trading Bank of Australia** (1972) 126 CLR 161 at 164. His Lordship further stated *ibid* at page 166:

*"I am aware, of course, that the amended Statement of Claim includes charges that in relation to the keeping of accounts, and in failing to give proper statement of account to the plaintiffs and in other ways the defendant has acted wrongfully ...*

*In my opinion the fact that those charges have been made ... is not a reason for restraining the defendant from exercising its powers under the mortgage. As I have stated, it is not in dispute that there is an indebtedness under the mortgage, that is to say, that there were advances of money which were not repaid. Neither the existence of disputes as to the correct amount of that indebtedness nor the claim ... of the plaintiff for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument."*

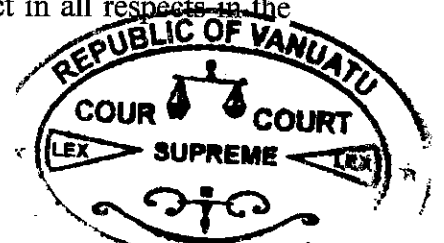
See also **Brunet v Westpac Banking Corporation** [2006] VUCA 11 where the decision in **Inglis** was applied. The Court of Appeal mentioned the fact that His Honour Justice Walsh also cited in the decision an extract from Halsbury's Laws of England as follows:-

*"The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the Mortgagee has commenced a redemption*



action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays 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."

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.
25. In **Tambe's** case, Touhy J was satisfied that the Claimant had proven all of the elements by the Sworn Statement filed in support of the claim and consequently he granted the application for summary judgment.
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.
28. In the result, I hereby make the following Orders:
  1. That the Claimant, as Mortgagee, be empowered to sell and transfer leasehold property contained and described in lease title number 11/OE31/090 ("the Property") 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 authorized by it in writing, be empowered to enter on the Property and act in all respects in the



place and on behalf of the proprietor of the lease, and to apply in reduction of the monies due and owing to the Claimant all or any rent received in respect of the said property.

3. That the purchase monies to arise from the sale and transfer of the Property 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 is hereby ordered to pay the costs of and incidental to this suit.

**DATED at Port Vila, this 2nd day of November, 2012.**

**BY THE COURT**

  
M.M. SEY  
Judge

