

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

Civil Case No. 148 of 2010

**BETWEEN:** SANDRINO H. TRAVERSO  
First Claimant

**AND:** ENTREPRISE S. TRAVERSO  
Second Claimant

**AND:** M. LYDIE MARA  
Second Counter-Defendant

**AND:** ATOM LIMITED  
Proposed Third Counter Defendant

**AND:** VECA LIMITED  
Proposed Fourth Counter Defendant

**AND:** REPUBLIC OF VANUATU  
Proposed Fifth Counter Defendant

**AND:** ANZ BANK (VANUATU) LIMITED  
Defendant/Applicant

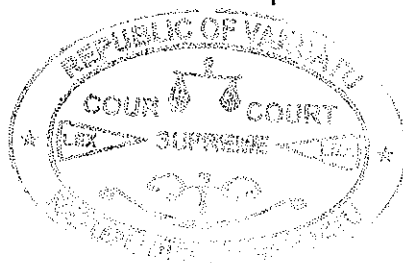
**Coram:** Justice D. V. Fatiaki

**Counsels:** Claimants in person  
Mr. M. Hurley for the Defendant  
Mr. D. Thornburgh for the Counter Defendants

**Date of Decision:** 23 September 2016

**JUDGMENT**

1. This is a long outstanding application to strike out the claim in this proceeding on the basis of the claimant's non-compliance with orders of the court dated 9 October 2012 and 13 December 2012 respectively.
2. In order to better understand the application it is necessary to briefly set the background to the claim and give it a relevant context. In this regard and for convenience I adopt the following extracts from the judgment of the Court of Appeal which concerned a related case: Civil Case No. 129 of 2012 where ANZ was the original claimant and which the defendant (the present claimant) unsuccessfully sought to consolidate with the present claim **see: Traverso v. ANZ Bank [2013] VUCA 8.**



3. In the appeal the Court of Appeal relevantly summarized the background to the dealings between the parties (with references to the present case) as follows:

*"... 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.*

*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.*

*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.*

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

*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.*

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

*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 ..."*

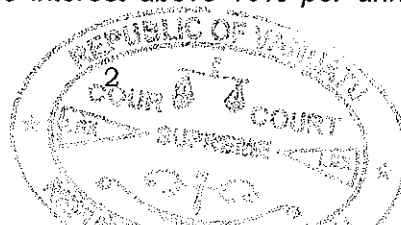
And in a reference to the present case the Court said:

*"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.*

*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. ..."*

Later in dismissing the claimants appeal against the grant of a summary judgment in favour of the Bank in Civil Case No. 129 of 2012, the Court of Appeal said:

*"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*



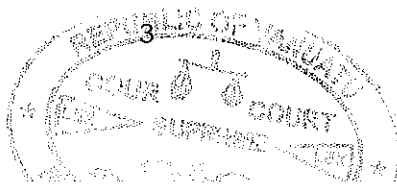
*facilities because the loan contracts were governed by French law and that the ANZ Bank had agreed not to charge interest at more than 10% per annum..*

*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.  
..."*

4. A perusal of the claim in the present case does not disclose a plea of "*non est factum*"; "*negligence*"; "*duress*"; or "*mis-representation*" against the Defendant Bank or indeed any facts that would support the same.
5. Be that as it may During the management of the case it became clear from the outset that the Court would need the assistance of an accounting expert and orders were made with a view to appointing an expert under Rule 11.13 with the agreement of the parties.
6. Unfortunately no agreement could be reached and both parties were left to their own devices always mindful that the Claimant bore the primary burden of establishing his claim that the loan contracts between him and the bank were governed by French law and the interest rate was limited to 10% per annum as opposed to the "*usurious rates of interest*" being charged by the Bank on a capitalized basis. In similar vein the Bank bore the burden of establishing its counterclaim to recover the sums due on the Claimant's loan accounts with the Bank.
7. On 22 October 2012 in compliance with the Court's orders, Roger Douglas Jenkins a qualified chartered accountant and the principal of Business Management Services provided a comprehensive 300+ page Report commissioned by the Bank for the purpose of ascertaining the correct balances on the Claimant's enumerated loan accounts commencing from April 2006 to 2012 including a specific instruction to: "*... include calculations based on the following assumptions:*
  - (1) *In relation to ... (the claimant's 3 business loan accounts) ... that from 16 July 2009 the applicable interest rate is 13.5% per annum;*
  - (2) *In relation to ... (the claimant's 2 personal loan accounts) ... that from 16 July 2009 the application interest rate is 10.5% per annum."*
8. As to the above-mentioned Report the Court of Appeal relevantly observed in the appeal case (op. cit):

*"... the court had also seen a sworn statement filed for the ANZ Bank in CC 148/10 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. ... 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**".*

*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*



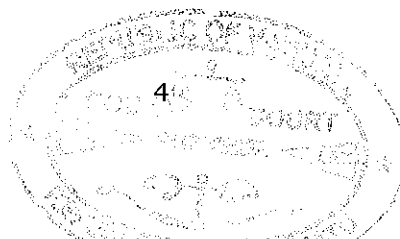
personal loans without consideration of any penalty rates that might have been applied from time to time by the ANZ Bank. Mr Jenkins' summary of the balances calculated as at 31 July 2012 was:

- a. **Total balance as per bank statements** - **VT203 376 178**
- b. **Recalculated by Mr Jenkins per loan facility documentation** - **VT199 608 757**
- c. **Recalculated by Mr Jenkins applying 13.5% per annum to the business loans/10.5% per annum to the personal loans** - **VT173 988 579**

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)."

(my highlighting)

9. Although this Court has not had access to the pleadings in the above-mentioned Civil Case No. 129 of 2012, the present case contains a substantial counterclaim seeking the repayment of in excess of VT100 million in principal plus accrued interest. There is also a serious allegation of fraudulent transfer of three (3) leasehold titles to **M. Lydie Mara** to defeat the Banks collateral mortgage over the same and the Bank seeks an order directing the return of the lease titles to the claimant in order to enable registration of the Bank's collateral mortgage over those titles to occur. So much then for the background.
10. For completeness it should be noted that the counterclaim was recently amended to include two incorporated companies **Atom Limited** and **Veca Limited** to which the above-mentioned lease titles were transferred after being surrendered in a further attempt by the claimant to dissipate and conceal the ownership of the said lease titles. This latest "device" which in the case of one of the lease titles was effected despite the existence of a "caution" on the title has been further restrained by the Court in an effort to maintain the "status quo" pending determination of the present proceedings.
11. Returning to the present application, on **9 October 2012** this Court with a view to obtaining expert assistance from the parties made the following orders:
  - "1. After discussions the issue for consideration by the parties expert is as set out in counsel's letter of 28 August 2012. i.e. What are the balances in respect of each of the claimant's bank accounts Nos. 798122, 9235256, 1060048 and 1119084 commencing from 20 April 2006 to date?
  2. Defendant to file and serve expert evidence as to the issue by 23 October 2012;
  3. **Claimant to file and serve expert evidence in response and confined or limited to the contents of any report prepared by the defendant's expert and to the agreed issue by 30 November 2012;**
  4. Defendant to file and serve a sworn statement in reply by 12 December 2012;



5. *Matter adjourn for review and further directions on 13 December 2012 at 9.00 a.m.*

On **13 December 2012** the Court adjourned the matter for a further 2 months:

- "1. ... to allow claimant's expert to produce and serve his report in advance on defendant's counsel;
2. **Wasted costs of VT5,000 ordered in favour of the defendant to be paid before 19 February 2013.**"

(my highlighting)

12. There having been no compliance by the claimant with the above highlighted orders, on 18 March 2013 the Bank applied to strike out the claim on the grounds that the claimant had failed to comply with the Court's orders and were not "... taking any steps to prosecute their claim":
13. Rules 9.10 and 18.11 of the Civil Procedure Rules relevantly provide:

**Striking out**

9.10 (1) *This rule applies if the claimant does not:*

- (a) *take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or*
- (b) *comply with an order of the court made during a proceeding.*

(2) *The court may strike out a proceeding:*

- (a) *at a conference, in the Supreme Court; or*
- (b) *at a hearing; or*
- (c) *as set out in subrule (3); or*
- (d) *without notice, if there has been no step taken in the proceeding for 6 months.*

**Failure to comply with an order**

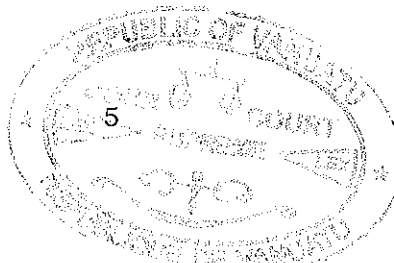
18.11 (1) *This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.*

(2) *A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.*

(3) *The application:*

- (a) *must set out details of the failure to comply with the order; and*
- (b) *must have with it a sworn statement in support of the application; and*
- (c) *must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.*

(4) *The court may:*



- (a) give judgment against the non-complying party; or
- (b) extend the time for complying with the order; or
- (c) give directions; or
- (d) make another order.

(5) This rule does not limit the court's powers to punish for contempt of court.

14. In Government of the Republic of Vanuatu v. Carlot [2003] VUCA 23 an appeal which arose soon after the introduction of the Civil Procedure Rules, the Court of Appeal in allowing an appeal against an order striking out the claim under Rule 9.10(1)(b) of the Rules said:

*"The provision of rule 18.11 will also come into play when there is a failure to meet a timetable. Adherence to this will ensure that before the Court exercises this grave and significant power of denying a party ..., it has before it all relevant information".*

15. This need for an application under Rule 18.11 was reiterated more recently by the Court of Appeal in Hilton v. Republic of Vanuatu [2014] VUCA 18 where the Court in allowing the appeal and reinstating the claim in the case said at paras. 6 and 7:

*"This court has on many occasions stressed that the power in Rule 9.10(1)(b) cannot be exercised without prior notice to affected parties in the manner and form required by Rule 18.11.*

*A similar power to strike out pleadings or proceedings for default contained in Rule 6.8(2) for a failure to comply with order made at a conference without reasonable excuse is also qualified by the requirements of Rule 18.11".*

16. In the present case the Bank's strike-out application was supported by a sworn statement deposed by counsel handling the matter at the time Abel Kalmet and included a sworn statement of Nigel Virah Toa confirming service of the application and sworn statement on the first claimant personally on 18 March 2013. Along with the documents served was the Court's order of 19 February 2013 which fixed the hearing of the application for "... 22 March 2013 at 8.30 a.m."
17. On 21 March 2013 almost 4 months after the due date, the claimant filed a document entitled Claimant's Memorandum enclosing a letter dated 30 August 2010 from Martin St Hilaire a partner and chartered accountant of AJC to the Bank's Head of Risk which attempted to trace and explain the claimant's dealings with the Bank for the period from 2003 to May 2010.
18. In his letter the author pointedly asserts that the Bank "... participated in (the claimant's) indebtedness" by increasing the claimant's "line of credit ... rather than deny him the credit and be suspicious about the financial health of his company ... The bank did not act at that time according to interest of his client". Furthermore: "ANZ should have required Audited Accounts".

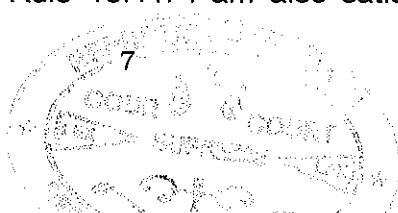


19. The Memorandum which enclosed Financial Statements for "Enterprise Traverso" for the years 2007 and 2008 records that as at 31 May 2010 there was a total indebtedness to the Bank of VT138,101,998 for the claimant's five (5) enumerated accounts.
20. The accompanying letter also identifies purported "overpaid interest" on the 5 accounts totaling VT8,621,429 for the period July 2009 to May 2010 where the actual interest charged on the accounts exceeded VT63 million and which the author claims "... explains a significant portion of the existing debt". The letter also confirms that "Mr. Traverso is unable to pay the full amount required by ANZ" and it further asserts "... that Mr. Traverso is not the only one responsible for the unfortunate situation in which he is as well as ANZ".
21. On the other hand the sworn statements filed by the Bank in support of its defence and counterclaim clearly shows an indebtedness in excess of VT200 million on the claimant's part for which the necessary demand had been made and remains unpaid. Furthermore the attached correspondence between the claimants and the Bank are all in English and includes emails from the first claimant in English and two of the Bank's Interest Rate Increase letters dated 16 July 2009 and 24 March 2010.
22. There is also a sworn statement from a former Assistant Manager of the Bank (Santos Vatoko) who had personal dealings with the claimant's loan accounts and who deposed inter alia:

*"I specifically recall that I was present in an interview room at ANZ when Mr Traverso signed ANZ's letter of offer dated 26 February 2008 on 13 March 2008. On that occasion I also recall seeing him insert his initials "ST" at the bottom of each of the pages of that letter dated 26 February 2008.*

*I also recall the circumstances in relation to Mr. Traverso's request for an increase in his temporary overdraft facility, the subject of ANZ's letter of offer dated 6 May 2008. I recall that once ANZ's letter dated 6 May 2008 had been prepared, Mr Traverso attended at ANZ's premises to sign it. Mr Schwenke was out of the office at that time and I recall telephoning Mr Schwenke and he said that it was okay for me to sign that letter of offer on his behalf. I recall that Mr Traverso read through that letter of 6 May 2008 and that he questioned the loan approval fee on page 2 of it. I recall that Mr Traverso crossed out the amount of the approval fee."*

23. On 22 March 2013 the strike-out application was heard. The claimant whose lawyer had filed a notice of ceasing to act on 14 February 2013, appeared in person and complained about the lack of communication and results from his lawyer and asserted that he had only signed the last page of the Bank's loan acceptance and loan variation letters (this was not pleaded).
24. There is no doubt in my mind that the claimant's Memorandum falls well short of complying with the court's order of 9 October 2012 and is "ineffectual". Likewise there is no evidence of the payment of the wasted costs order.
25. Conversely, I am satisfied that the Bank has strictly complied with the procedural requirements of Rule 18.11. I am also satisfied that the Claimant

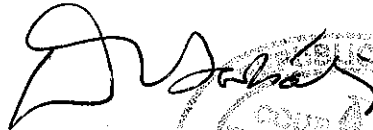


was given sufficient time to comply with the Court's orders of October and December 2012 and failed to do so. Moreover the claimant did not seek an extension of time to comply or explain his non-compliance. In short, the Claimant has failed to "show cause" why an order should not be made by the Court under sub-rule 4.

26. In all the circumstances the application is granted and the claim is struck out with costs.
27. The Bank's amended counterclaim is directed to follow its normal course and the additional counter defendants are ordered to serve defences (if any) within 21 days of the date hereof. The counterclaim is listed for a conference on 28 October 2016 at 9.00 a.m.

**DATED at Port Vila, this 23<sup>rd</sup> day of September, 2016.**

**BY THE COURT**



**D. V. FATIAKI**  
**Judge.**

