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IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU **CIVIL CASE 826 of 2015**
(Civil Jurisdiction)

BETWEEN: **NATIONAL BANK OF VANUATU LIMITED**
Claimant

AND: **COLIN PIERRE VENTER and RITANA BRANDA JEURSEN**
Defendant

Coram: *Vincent Lunabek Chief Justice*

Counsel: *Mr Mark Hurley for the Claimant*
Mr Dane Thornburgh for the Defendants

REASONS FOR JUDGMENT

1. This is a claim by the National Bank of Vanuatu Limited (claimant) to enforce a Third Party Collateral Mortgage through specific performance against the Defendants.

The Pleadings and relief sought

2. The claimant filed a statement of claim on 18 December 2015 claiming that:

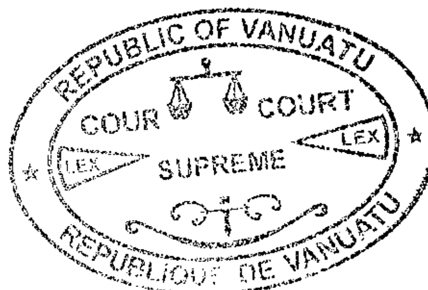
   i. The Defendants agreed to provide a third party mortgage over leasehold title 04/2642/001 ("Surunda Property").

   ii. The Defendants have failed to execute the necessary documents required to perfect the Third Party Collateral Mortgage.

   iii. The claimant, pursuant to the agreement, is entitled to pursue enforcement of the Third Party Collateral Mortgage through specific performance.

3. The claimant's claim seeks the following relief:

   a. An order for specific performance directing the Defendants to perform the agreement between the claimant and the Defendants, by executing and perfecting a Third Party Mortgage (collateral) between the claimant, as Mortgagee, the company as Customer



and the Defendants as Mortgagors, for the principal sum of VT 181, 200, 000 in favour of the Claimant is triplicate, and deliver up same to the claimant's solicitor, George Vasaris & Co.

b. An order that the Defendants execute all necessary consent applications to obtain Lessor's consent to enable registration of the Mortgage referred in paragraph 1 hereof and take all other necessary steps to facilitate the expeditions registration of the said Mortgage.

c. The Defendants be ordered to pay the costs of and incidental to this proceeding.

d. Such further or other relief this Honourable Court shall deem just.

4. The Defendants filed a Defence on 27 January 2016 denying the allegations and bringing a counter-claim against the claimant.

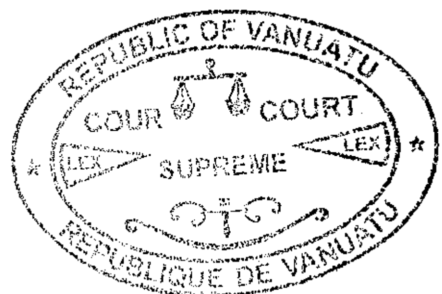
5. The Defendants' Defence is that:

i. There were no definite terms agreed upon by the Defendants to provide a third party mortgage over Leasehold title 04/2642/001 ("Surunda Property") on or about September 2012

ii. Any claim by the claimant to enforce the security to cover defendants pertaining to Lope Lope Adventure Lodge Limited ("the company") was redeemed at the date of the mortgagee in possession order made 26 August 2016 and becoming effective on or about 26 November 2014.

iii. There were alternative causes of action available to the claimant.

iv. There was a contract for sale and purchase of the Surunda Property on foot that the Claimant was aware of since 2012 and same was varied pending amendment of the Surunda Property proprietor into the names of the Defendants instead of Jenver Inc which legally could not own land. The change of name was not to facilitate the third party mortgage.



v. There were no funds advanced by the claimant to the Defendants or the company pursuant to the supposed agreement to provide third party mortgage and any such consideration (if any) was past consideration.

6. The Defendants has brought a counter-claim against the Claimant based on two fronts pleaded as alternatives:

i. The Claimant never had a cautionable interest when they lodged the cautions dated 30 September 2012, 10 October 2014 as 03 December 2015 over Leasehold title04/2642/001 thus entitled to relief under Land Leases Act (s.97 (5)).

ii. The Claimant breached their fiduciary duty as owed to the Defendants resulting in damages being suffered by way of:

(a) Restraining the Defendants from dealing with the Leasehold title to sub-divide and develop same;

(b) Sell part of the sub-divided portion to raise capital to reduce the debt owed by the Defendants to the Claimant,

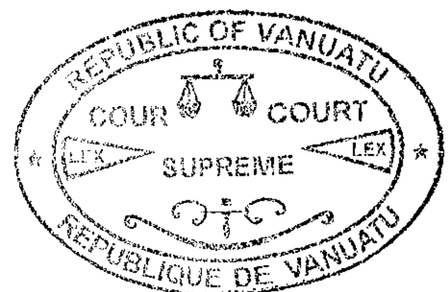
(c) Utilise capital to further develop Lope Lope Resort and realise profits to service the loan and keeping same from defaulting.

7. The defendants claim the following relief by way of counter-claim:

i. Damages pursuant to s.97 (5) Land Leases Act and/ or breach of fiduciary duties of no less than USD $6, 000, 000. 00 (Six Million United States Dollars).

ii. Interest thereon at 5% since 30 September 2013 of USD $675,000.00 (Six Hundred and Seven Six thousand United States Dollars) up to that date of filing accumulating at $USD 25,000.000 per month.

iii. Costs of and incidental to the proceedings to be paid by the Claimant on indemnity basis.



8. The Claimant replied to the defence and filed a defence to the counter-claim on 11 March 2016. The Claimant joins issue upon the whole Defence. The Claimant says the following:-

a) It denies that its registered mortgage over the company's leasehold title no. 04/2641/049 (the company's title) was redeemed and/or discharged as at the date of the possession orders made on 26 April 2014 in Civil Case No. 30 of 2014 (which became effective on or about 26 November 2014) as alleged.

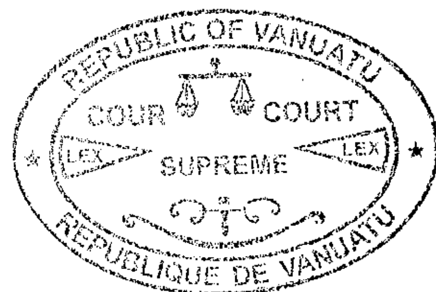
b) It says that its mortgage over the company's title remains registered over the company's title and enforceable by the Claimant not withstanding that the Claimant is exercising its power of sale.

c) It says that the evidence in relation to its request that the Defendants provide a collateral mortgage over leasehold title 04/2642/001 (the Defendant's title) is outlined in the sworn statement of Jerry Ishmael filed on 2 December 2015 in this proceeding (at paragraphs 17 to 29).

d) It says the Claimant's request that the Defendants provide a collateral mortgage over the Defendants' title were at all times request made of the Defendants, who are the directors and beneficial owners of the company, the company having been the recipient and beneficiary of the facilities granted by the Claimant to it at the Defendants' request.

e) It says the Defendants were apparent controllers of the entity known as Jenver Incorporated and were in a position and did agree by Colin Venter's email to the Claimant dated 13 November 2012.

f) It says the Defendants agreed to take all steps in support of the Agreement to provide to the Claimant the requested mortgage over the Defendants' title which steps included the registration of the change of the registered lessee of that title from Jenver Incorporated.



g) It says the Claimants' request to provide the mortgage over the Defendants' title was agreed to by the Defendants by Mr Venter's email to the Claimant dated 13 November 2012.

h) It says the Agreement that the Defendants provide a collateral mortgage over the Defendants' title was collateral to the principal mortgage having been provided by the Company and the consideration for the collateral mortgage included the Claimant agreeing to forebear from commencing proceedings against the Company whose obligations to the Claimant were then default. The Notices of Demand dated 19 April 2012 were served on the Company (paragraph 12 of Jerry Ishmael's sworn statement filed on 2 December 2015 and the email from Jerry Ishmael to Colin Venter dated 18 September 2013). The Claimant further says:

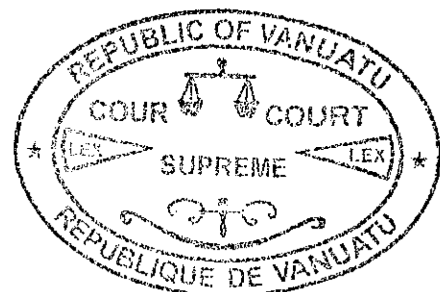
   i. the purpose of the collateral mortgage over the Defendants' title was stipulated in the Claimant's letter to the Defendants dated 3 July 2013 under cover of which the proposed collateral mortgage was attached;

   ii. when the collateral mortgage could be released was subject to the Company's fulfilment of its obligations under its loan agreement with the Claimant and/or as implied by operation of law as an incident of the Loan Agreements and Mortgage, as varied, between the Claimant and the Company; and

   iii. the request "that Matilda's section will be excluded" was an apparent reference by Mr Venter to the Defendants purported agreement to sell part of the Defendant's title to his sister, Matilda Cole, however, any such agreement with Ms Cole was never capable of being completed as the Defendants' title has never been sub-divided.

i) It denies the allegation that it does not come to the Court with clean hands and also denies that it owed the Defendants a fiduciary duty as alleged. It denied also:

   i. That it breached any fiduciary duty as alleged or at all; and further:



1. denies that the Claimant's caution lodged over the Defendants' title on or about 30 September 2013 resulted in any breach of fiduciary duty to the Defendants as alleged or at all;

2. denies that at the time of the lodgement of the caution over the Defendants'' title on or about 30 September 2013 that the Claimant did not have a cautionable interest;

3. denies that the Claimant's caution dated on or about 10 October 2014 did not set out the Claimant's cautionable interest in the Defendants' title as required by section 93(1)(a) of the *Land Leases Act.*

4. denies it ever received any notice of the intended removal by the Director of Lands of its caution dated on or about 10 October 2014.

5. says its caution dated on or about 3 December 2015 was registered by the Director of Lands and it is also supported by the injunctive relief granted by this Court on 11 December 2015.

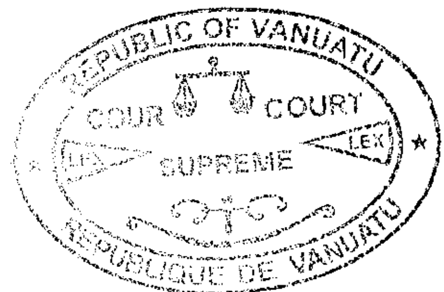
6. denies, for the reasons outlined below, that the Defendants are entitled to damages pursuant to section 97(5) of the *Land Leases Act* or at all.

j) The Claimant further says:

(a) It had a cautionable interest in the Defendants' title;

(b) It had reasonable grounds on which to lodge the caution dated on or about 10 October 2014 and the caution dated on or about 3 December 2015;

(c) That prior to the lodgement of these cautions, it had obtained legal advice to the effect that it had a cautionable interest in the relevant land and that the cautions should be lodged to protect its interests. The relevant legal advice is contained in a letter from George Vasaris & Co to the Claimant dated 10 October 2014. For the avoidance of doubt, privilege is maintained over all parts of that letter other than the advice expressly referred to in this pleading.



(d) If the Defendants have suffered loss and damage (which is denied), then they failed to take necessary steps to mitigate their loss, including by failing to make an application pursuant to s.97 of the *Land Leases Act*.

9. In its defence to the counterclaim the Claimant says:

   a. In all allegations in the counter-claim, the Claimant denies and says that those allegations are repetitive of the Defendants allegations in their defence.

   b. The Claimant denies that it owed the Defendants a fiduciary duty as alleged or at all.

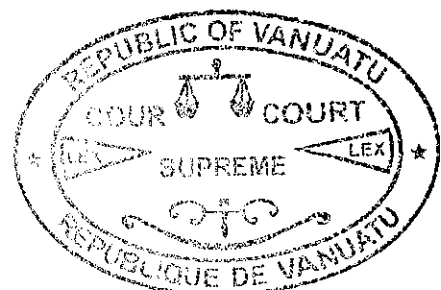
   c. In the event that the Court finds that such fiduciary duty exists, it denies that it breached the fiduciary duty as alleged or at all.

   d. The Claimant denies paragraph 5 of the Counterclaim and says there is no evidence that but for the Claimant's cautions registered over the Defendants' title that the Defendants would ever have been in the position to subdivide the Defendants' title. It is said in order to subdivide any registered lease the consent of the registered lessor is required pursuant to section 41 (h) of the Land Leases Act. There is no evidence that the Defendants have ever sought or obtained the registered lessor's consent to subdivide the Defendant's title.

   e. It denies that the Defendants have suffered monetary loss and damages as alleged or at all and says further that the Defendants have no standing to allege any loss and damage in respect of the Company's Lope Lope Resort property and business, which claim for loss and damage could only made by the Company but in any event:

      i. The Company consented to the mortgagee power of sale orders dated 26 August 2014 over the Company's title in Civil Case No. 30 of 2014; and

      ii. Pursuant to court order in Company was wound up; and



f. It denies that the Defendants are entitled to any damages pursuant to s.97(5) of the *Land Leases Act* as alleged or otherwise.

g. It says that the Counterclaim does not disclose any reasonably arguable claim and should be dismissed with an order for costs.

The Triable Issues

10. At the commencement of the trial the following are the trial issues for Court determination:

1. Did the Defendants agree to provide a third party mortgage to the Claimant over leasehold title no. 04/2642/001 (the Surunda Property)?

2. If so, can such agreement be specifically enforced?

3. If the answer to either of the above two issues is no, are the Defendants entitled to the relief sought in their counterclaim? The answer to this question is dependent upon the following questions:

   a) Did the Claimant has grounds to lodge a caution against the Surunda Property?

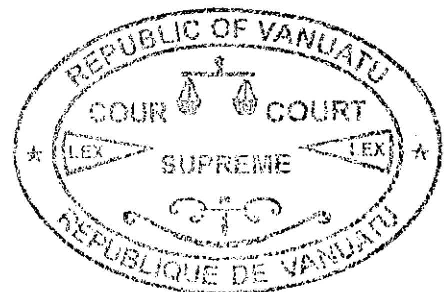
   b) If so, are they entitled to relief under s.97 (5) of the Land Leases Act?

   c) Alternatively, has the Claimant breached their fiduciary duties to the Defendant?

The Background

11. The Claimant is the National Bank of Vanuatu Limited (NBV), a local company holding a banking licence pursuant to relevant and respective local Company and Financial Institutions Legislations.

12. The Defendants are the directors of the Claimant's customer, Lope Lope Adventure Lodge Limited (in Liquidation) (the Company).



13. Pursuant to a series of written agreements dated from on or about 16 June 2009, at the Company's request, the Claimant agreed to and advanced to the company various facilities.

14. The said facilities are secured by a Mortgage, as varied, over the company's leasehold title 07/2641/049 (the Company's title) to secure the principal sum of VT181, 200,000.

15. From in or about September 2012, the Claimant requested the Defendants to provide a mortgage over their leasehold title no. 04/2642/001 (the Defendant's title) as collateral security for the aforesaid facilities the Claimant had advanced to the Company on the ground that it was under-secured in relation to the said facilities.

16. The said request was partly oral and partly written. Particulars of the emails passing between the Claimant, on the one hand, and the Defendants, on the other hand, are as follows:

 a) email exchanges between Mr Venter and Jerry Ishmael, Head of Retail Banking of the Claimant between 10 October 2012 and 12 October 2012;

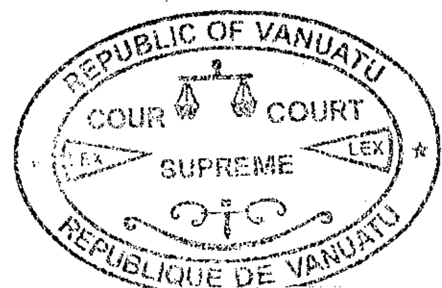
 b) email exchanges between Venter and Mr Ishmael between 22 October 2012 and 29 October 2012; and

 c) Mr Venter's email to Mr Ishmael dated 13 November 2012.

17. Pursuant to Colin Venter's email to the Claimant dated 13 November 2012 sent by Mr Venter to the Claimant on the Defendant's behalf, the claimant said the Defendants agreed to provide to the Claimant the requested mortgage over the Defendant's title (**the Agreement**). The particulars are as follows:-

 "Surunda – as we do appreciate the patience, and really want to see the resort sold and loans paid off, we will agree to it... provided it is stipulated clearly what the purpose is, when it can be released, that Matilda's section will be excluded etc. Once you have a draft, please send to us so we can approve/add/delete etc."

18. At the time of the Agreement the registered lessee of the Defendant's title was Jenver Incorporated, being an entity that was unregistered in the Republic of Vanuatu.



19. It is said, in part performance of the Agreement, the Defendants agreed to change the name of the registered lessee of the Defendants' title from Jenver Incorporated into the Defendants' names. It is to be particularised as follows:-

(a) email exchanges between Mr Venter and Mr Ishmael on 4 January 2013 and 22 January 2013 and 4 February and 18 February 2013, respectively; and

(b) Defendants' Certificate of Name Change dated 13 February 2013.

20. The change of the registered lessee of the Defendants' title from Jenver Incorporated in to the Defendants' names was registered by the Director of Lands on 12 March 2013. (See Director of Lands' advice of registration dated 12 March 2013).

21. As a result of the Agreement, the Claimant forwarded to the Defendants a Third Party Mortgage (Collateral) for execution between the Claimant, as Mortgagee, the Company, as Customer and the Defendants, as Mortgagors to secure the principal sum of VT181, 200, 000 under cover of its letter dated 3 July 2013.

22. Despite the Agreement, The Defendants have refused the Claimant's request to execute the said Third Party Mortgage (Collateral). (See Mr Venter's email to Mr Ishmael dated 18 September 2013).

23. As the result of the Defendants' said refusal to comply with the terms of the Agreement by executing and perfecting the said Third Party Mortgage (Collateral), the Claimant seeks an order for specific performance directing the Defendants to comply with the Agreement.

24. I now turn to the evidence.

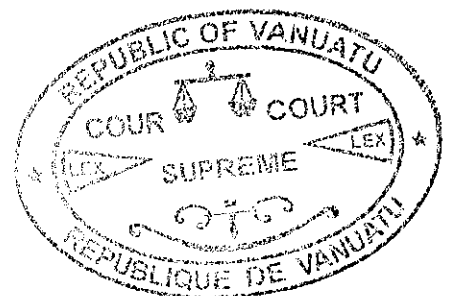
The Evidence in this case

The Claimant's Evidence

25. The following statements were tendered as evidence for the Claimant:-

a) Sworn statement of Jerry Ishmael filed on 2 December 2016 (Exh. C1);

b) Sworn statement of Sylvianne Stevens filed on 3 December 2015 (Exh. C7);



c) Sworn statement of George Vasaris filed on 3 December 2015 (Exh. C6);

d) Sworn statement of Ben Dick Dali filed on 3 December 2015 (Exh. C3);

e) Sworn Statement of Dick Dali [No.2] filed on 5 April 2016 (Exh. C4);

f) Sworn Statement of Ben Dick Dali [No.3] filed on 30 June 2016 (Exh. C5);

g) Sworn Statement of Jerry Ishmael [No.2] filed on 1 July 2016 [Exh. C2].

The Defence's evidence

26. The following statements were tendered as evidence for the Defendants:-

a) Sworn statement of Colin Venter filed on 10 May 2016 (Exh. D17);

b) Sworn statement of Matilda Cole filed on 30 May 2016 (Exh. D18);

c) Sworn statement of Matilda Cole filed on 6 July 2016 (Exh. D19).

The Discussion on evidence

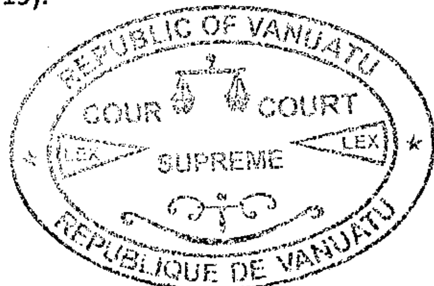
27. The details of the evidence in this case are contained in the sworn statements deposed or tendered and in the Court file records of evidence under cross-examination. Matters of facts not in dispute between the parties or admitted or accepted are not to be found. Only essential disputed facts are to be found by the Court.

28. Based on evidence I have read, heard and considered, the following are facts as found and accepted by the Court:-

a) Before the collateral mortgage become an issue between the parties, there were lengthy history of dealings between the parties since 2009. This includes the following matters:

i. The Claimant had advanced facilities to Lope Lope Adventure (the Company) by way of a term loan with a principal limit of VT195, 000, 000 (Exh. C1 at pp 12-15).

ii. The Claimant had also given Lope Lope an overdraft facility of VT3, 000, 000 to facilitate its business operation (Exh 1 at pp 16-19).



iii. Lope Lope was in default of its obligations in respect of both the term loan and its overdraft facility and as the result the Claimant served Notices of Demand dated 19 April 2012 on Lope Lope's registered office (Exh. C1 at pp 24-25).

iv. Lope Lope had not paid any sums in the reduction of its indebtedness between the date of the notices of demand of 19/4/2012 and the Claimant obtaining a valuation of Lope Lope as at 6 August 2012 (Exh. C1 at pp 28-32 and Exh. D15).

v. On page 2 of the "Provincial Liquidators" Report to Justice Aru regarding Lope Lope Adventure Lodge Limited dated 16July 2015 (Exh. D13) there were only four "repayments" to the Lope Lope account between 30/09/2011 and 30/06/2015 and three of those, namely on 22 May 2014, 22 May and 1 August 2014 were reversal of late fees by the Claimant. That is, there were not repayments made by and on behalf of Lope Lope.

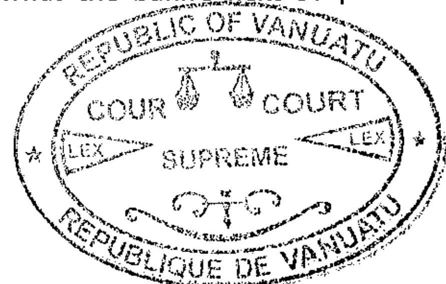
vi. It is accepted that the email exchanges between Jerry Ishmael and Colin Venter (at PP 33 TO 36 OF Exh. C1) record the Claimant's request (and Mr Venters responses) to the granting of a Collateral Mortgage over Surunda Property as follows:

- In Mr Venter's email to Mr Ishmael of 10/10/12 (3.05pm) he stated:

  > "Surunda Residence – we (me and Ritana) have minced about this so many times in the last couple of weeks and fail to see the reason for putting it on as extra security, especially based on above valuation issue. Assuming worst case scenario, how much times does it buy us (if we do surrender it) before the bank steps in and tries to sell it at a devalued price to offset the Lope Lope mortgage?"

- Mr Ismael responded in his email of 11/10/12 (11.13am):

  > " I will do a full review to the bank together with the additional information expected today from you and proposed collateral security and will inform you of what the bank's next step is. I



would still think that the bank will consider a mortgage over the residence as a sigh of good faith given the bank's lenient stance it has all this year as you rightly mentioned."

- Mr Venter responded in his email of 12/10/12 (10.40am):

  "Also, if we do place Surunda as collateral, the question was how much time does it "buy" us before we are back to square one – presuming worst case scenario where no bulk amounts are paid..."

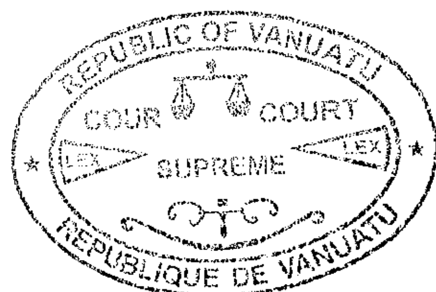
- Mr Ishmael responded in his email of 12/10/12 (4.57pm):

  "On the collateral security over the Surunda Property. We will not commence legal proceedings once we obtain the mortgage. We will let you know well in advance if we looking at the process or do down that path.. Once this full review is done I will be in a position to present to you a full outline but right now I can assure you that we will not commence any legal actions over the next 6 months. I think our actions over the last 9 months can assured my statement."

vii. It is an accepted fact that the Claimant did not commence legal action over the next 6 months from October 2012. It is a fact that mortgage power of sale proceedings over Lop Lope's title no. 04/2641/049 were not commenced until 2014 (Civil Case No. 30 of 2014, Exh. 10) and liquidation proceedings against Lope Lope were not commenced until 2014 (Company Case No. 15 of 2014, Exh. C11).

viii. The above email exchanges and communications between Mr Ishmael and Mr Venter led to the 13 November 2012 email in which Mr Venter stated in part:

"Surunda - as we appreciate the patience, and really want to see the resort sold and loans paid off, we will agree to it...provided it is stipulated clearly what the purpose is, when it can be released, that Matilda's section will be excluded etc. Once you have the draft, please send to us so we can approve add/delete etc."



ix. Mr Venter also agreed in cross-examination that his statement in that email "we will agree to it" referred to the Defendants' agreement to provide a mortgage over the surunda property.

x. It is an accepted fact that Mr Venter first told Mr Ishmael about a proposed sale by way of sub-division of the Surunda property by his email of 2 May 2012 (pp 20-23 of JI1, Exh. C1). Mr Venter attached to that email a copy of the "Agreement for Sale and Purchase of Surunda Land Sub-Divided Residential Property" dated 2 May 2012. Further Mr Venter sated in part in his email of 2 May 2012 that:

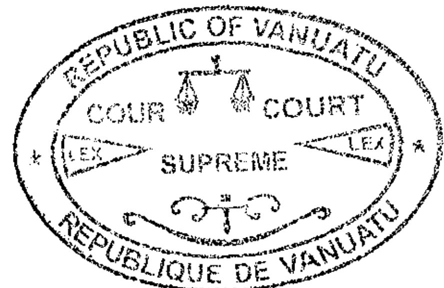
> "The other property in Surunda, but remember that we can only sell that once the sub-division is complete and the custom land owners are paid the last bit."

xi. In addition, Mrs Cole's evidence in paragraphs 29 and 30 in her sworn statement (Exh. D19) is that:

> "29. At that time of the entering into the original contract dated 2 May we were unsure as to the total area of land as there was discussions of an extension to the said title that Colin was in discussions with the Custom Land owner to grant and approve the larger Lease.
>
> 30. We decided not to agitate the fulfilment of the Contract on the above basis, however on or about 13 September I realised that the land and proposed extension was not going to become a reality."

xii. It is accepted that in cross-examination both Mrs Cole and Mr Venter admitted that the custom owners had not agreed to an extension of the Surunda Property in respect of the 2 May 2012 Agreement.

xiii. The variation of the 2 May 2012 Agreement to sub-divide did not occur until 13 September 2013 (annexure D to Exh. C17). Mr Venter admitted in cross-



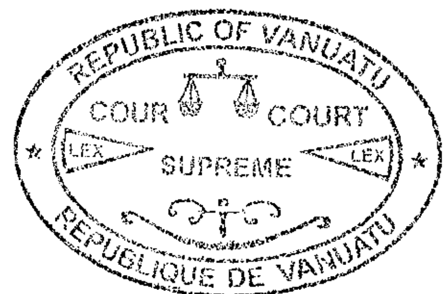
examination and re-examination that he never told the Claimant about the variation agreement of 13 September 2013.

xiv. It is not disputed that the variation to the 2 May 2012 Agreement was on 13 September 2013. That is some three months after the Claimant had arranged for delivery of its letter to the Defendants dated 3 July 2013 enclosing the proposed collateral mortgage.

b) It is an accepted fact that the change of the name of the registered lease of the Surunda Property from Jenver Incorporated into the Defendants' names was made as the result of the email exchanges and communications between Mr Venter and Mr Ishmael:

- Email exchange from Mr Venter and Mr Ishmael on 4 January 2013 [pp 43-44 of Exh. C1)
- Mr Venter's email to Mr Ishmael dated 22/1/2013 [p 43, Exh. C1). In the email Mr Venter said, in part: "Perhaps leave it like it is and we sign a separate agreement/pledge or something" which can only be construed as his knowledge that the purpose of the change of name from Jenver Inc. to the Defendants' names was to facilitate the agreement recorded in the 13 November 2013 email.
- There were further emails exchanges on the change of the name (Mr Ishmael's email to Mr Venter dated 4/2/2013 [p46, Exh. C1); email exchanges between Mr Venter and Mr Ishmael between 15 February 2013 and 15 February 2013 [p45, Exh. C1). In Mr Ishmael's email to Mr Venter dated 10 September 2013 (p 76 Exh. C1)). Mr Ishmael's email to Mr Venter dated 10 September 2013 (p76), the stated in part in the second paragraph:

  > "Both Ritana and yourself agreed and made [sic] arrangements to transfer the title to your joint names to enable the bank to obtain the collateral mortgage."



c) These were the accepted evidence of the steps taken to change the name of the registered lessee of the Surunda Property from Jenver Incorporated into the Defendants' names. These steps culminated in the registration by the Director of Lands of the change of name [pp 47 to 48, Exh. C1]. The evidence of Mr Ishmael and Mr Dali were to that effect.

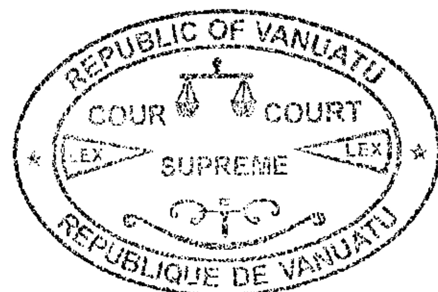
d) Mr Venter stated in paragraph 7 of his sworn statement [Exh. D 17] that:

"On third March 2013, I changed the name that Surunda Property was registered in from an offshore company could not hold a land title in Vanuatu. This was done for the sole purpose of the company correctly registered in Vanuatu and not, as the Claimant asserts, in the view of signing the property over to them as Third Party Collateral"

e) Mr Venter's above statements at paragraph 7 of his sworn statement cannot be accepted as a fact and it is rejected for the following reasons:-

- If it was an essential aspect of the defence, it should have been pleaded in the Defendants' defence. It was not.
- It is contrary to the contemporaneous email exchanges between Mr Ishmael and Mr Venter. It is noted that at no stage in any of those emails was it suggested by either Mr Ishmael or Mr Venter that an offshore company could not hold a land title in Vanuatu.
- It is a fact that Mr Venter was concerned at the potential costs of the change of name from Jenver In. on Surunda Property in his email to Mr Ishmael of 22/1/2013 and he suggested as an alternative: " Perhaps leave it like it is and we sign a separate agreement/pledge or something." There was no any other credible fact evidence as to how the Defendants came to realise that an offshore company could not hold a title in Vanuatu.

f) Mr Venter responded to Mr Ismael by email dated 18 September 2013 (p.75 Exh. C1) but nowhere in that email (or at any time) did he refute Mr Ishmael's statement in



his email of 10 September 2013 and say anything along those line of his statement in paragraph 7 of Exh. D17.

g) It is rational to infer from the logical sequence of the above events that in all the circumstances the statement in paragraph 7 of Exh. D17 was reflective on an "after thought" by Mr Venter in an attempt to rebut the evidence of the Claimant of what was recorded on the 13 November 2012 email and pleaded in the claim.

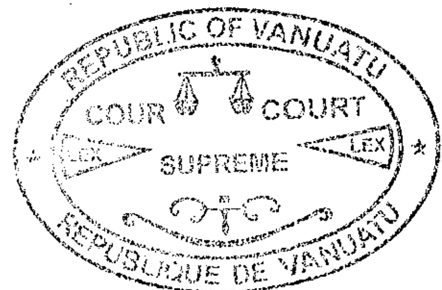
29. It is accepted that from the numerous emails exhibited to the sworn statement of Mr Ishmael (Exhibit C1) dated between 2 May 2012 and 23 November 2013 that it was Mr Ishmael that had the daily conduct of the Defendant's file on behalf of the Claimant. Mr Ishmael was in frequent telephone and email contact with Mr Venter. It was rational that he was the best person to give evidence about the decisions the Claimant made in respect to the third party mortgage.

30. It is noted that the CEO or the Head of Credit would only have corroborated Mr Ishmael's evidence as to the decisions made regarding the third party mortgage and would not have added anything to the probative value of Mr Ismael's and Mr Dali's evidence.

31. It is clear from Mr Ishmael's evidence that since his receipt of the 13 November 2012 email from Venter that Mr Ishmael on behalf of the Claimant was seeking Mr Venter's cooperation to obtain the third party mortgage over the Surunda Property.

32. Mr Ishmael evidence shows that from the time of 13 November 2012 email that steps were taken firstly, to change the registered names of the Surunda Property into the Defendant's names before the third party mortgage could proceed and secondly, once the Defendants received the proposed third mortgage in or about July 2013 Mr Ishmael attempted to persuade them to sign it and return it to him.

33. It is also accepted that no instructions for the preparation of the third party mortgage could occur as at August 2012 because Mr Venter did not communicate the Defendants' agreement to provide it under his email to Mr Ishmael of 13 November 2012



34. The evidence on behalf of the Claimant is that the 13 November 2012 email was an agreement that the Claimant could rely on it despite conditions.

35. Mr Dali did not give any evidence to the effect that the conditions in the 13 November 2012 had not been met.

36. Mr Dali did not give evidence to the effect as demonstrated by the fact that Mr Venter admitted in cross-examination that he did not tell the Claimant about the 13 September 2013 Agreement between the Defendants and Kundalini Limited to sub-divide the Surunda Property.

37. Further Mr Dali did not admit that the Claimant had no grounds to register its replacement caution of 10 October 2014 over Surunda Property.

38. Mr Ishmael and Mr Dali are creditworthy witnesses. Mr Vasaris was called to confirm what he did and when. There is no challenge to his evidence. He is a truthful witness.

39. Mr Venter's evidence can at times be characterised as given from someone who did not want to listen to the questions he was asked. He was determined to say what he wanted to say regardless of whether it was responsive to the question asked. I do not believe him in some essential part of his evidence and I reject them. He was evasive in his cross-examination. It is a fact there was no appeal lodged against Justice Aru's Ruling in Company Case No. 15 of 2014. Mr Venter refused to say that. It is rational to infer that the criticism made by the Defendant's counsel during the cross-examination of Mr Ishmael and Mr Dali regarding the appointment of Mr Stafford and Mr Sinclair as provisional liquidators which was the purpose of Aru J's Ruling was misplaced because that Ruling had never been subject to an appeal. Mrs Cole appeared to be more reliable than Mr Venter when she gave her evidence.

40. It is a fact that at the end of his re-examination, Mr Venter made reference to the amended agreement dated 13 September 2013 to subdivide the Surunda Property with an entity, Kundalini Limited (controlled by his sister, Matilda Cole and her husband, Dennis Cole). That was five days before he advised the Claimant (through Mr Ishmael) in

his email of 18 September 2013 that the Defendants were not comfortable with signing the terms of the Third Party Mortgage (collateral) that had been submitted to them.

41. That defies any credibility on assessing all the evidence in this case. It is clear, the Defendants knew on 13 September 2013 that they had an agreement with the Claimant to provide collateral mortgage over Surunda Property as recorded in the 13 November 2012 email. It is a final fact that the direct result of the Defendant's refusal to honour that agreement let the Claimant lodging its cautions and filing its claim to ask for the Court to grant relief.

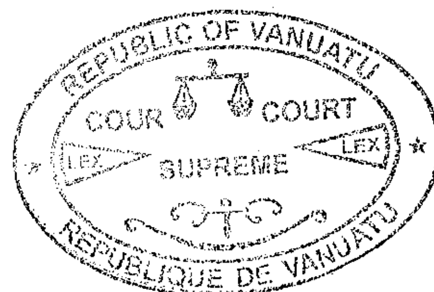
42. On the counter-claim, it is accepted from the evidence of Mrs Cole in paragraphs 29 and 30 of her sworn statement (Exh. D19), the answers she gave in cross-examination and also the answers that Mr Venter gave in cross-examination that the reason why the 2 May Agreement did not proceed was to do with the issues concerning negotiations with the custom owners to extend the Surunda Property title and also the Custom owners were involved in a dispute before the Courts.

43. The Claimant lodged its first caution dated 30 September 2013 to protect its interest on the Surunda Property title.

44. The Defendants took no steps to have that caution removed. The first steps taken to have it removed was the letter of demand from their lawyers, Thornburgh Lawyers, to the Claimant dated 30 September 2014 (Annexure G, Exh. D17). It is also accepted that by that time the mortgagee power of sale orders had already been made, by consent, over the Lope Lope title on 26 August 2014. (Exh. C10).

45. The Claimant registered its second caution to protect its interest over Surunda Property on 10 October 2014. That registration was notified to the Claimant by the Director of Lands' letter dated 27 October 2014. (Annexure I, Exh. D17).

46. Between the time of registration of the Claimant's second caution dated 10 October 2014, the Defendants took no steps to have it removed until their letter dated 16 July 2015 (Annexure J, Exh D17).



47. It is accepted that the Defendants did not move promptly to have either of the Claimant's first or second cautions extinguished.

48. I now answer to the Issues before the Court.

ISSUE NO.1: Did the Defendants agree to provide a Third Party Mortgage to the Claimant over Leasehold Title no.04/2642/001 (the Surunda Property)?

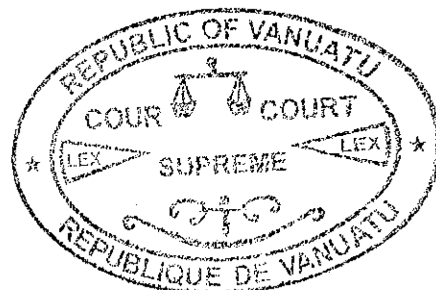
49. The Defendants submit that the Defendants did not agree to provide a third party mortgage. The Defendants say in consideration of the evidence tendered and produced under cross-examination it is clear that although the Claimant intended to secure the third party mortgage from the Defendants and discussions were held relating to same, the Defendants never agreed, whether express or implied, to provision of the third party mortgage. It is said the evidence clearly shows that there were no definite terms agreed upon by the Defendants to provide a third party mortgage over Leasehold title 04/2642/001 ("Surunda Property") on or about September 2012.

50. The Claimant submits that this issue must be answered in the affirmative.

51. I agree and accept the Claimant's submissions and I reject the Defendant's submissions on this issue for the following reasons:-

a) The history of dealings between the Claimant and the Defendants and, in particular the terms of the email from Colin Venter to Jerry Ishmael dated 10 October 2012 (the 10 October 2012 email) and 13 November 2012 (the 13 November 2012 email) evidence the formation of a legally binding agreement pursuant to which the Defendants focused and considered the Surunda Residence as extra security to their loans over Lope Lope and agreed to provide a mortgage over the Surunda Property. In this regards, the 10 October 2012 and 13 November 2012 emails relevantly state:

> "Surunda Residence – <u>We</u> (me and Ritana) <u>have minced about this so many times</u> in the last couple of weeks <u>and fail to see the reason for putting it on as extra security</u>, especially based on above valuation issue. Assuming worst case scenario, how much times does it buy us (if we do surrender it) before the



bank steps in and tries to sell it at a devalued price to offset the Lope Lope mortgage? (emphasis added).

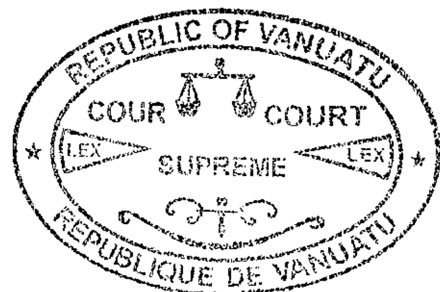
> Surunda – as we <u>do appreciate the patience</u>, and <u>really want to see the result solved and loans paid off</u>, <u>we will agree to it</u>...provided it is stipulated clearly what the purpose is, when it can be released, that Matilda's section will be excluded etc... Once you have the draft, please send to us so we can approve add/delete etc. (emphasis added).

b) I accept the Claimants submission that, in this case, the agreement was supported by valuable consideration. In order to establish the existence of good consideration, it must appear the promise was really offered as the price or quid pro-quo for the action taken: *Australian Woolen Mills Pty Ltd v. Commonwealth (1954) 92 CLR 424, Dixon CJ Williams, Webb, Fullanget and Kitto JJ at 456-457*. It is clear that an agreement can be supported by consideration being forbearance to sue: see for example *Jun Lin v Commonwealth DPP [2005] NSW SC 431, Pattern AJ at [281]-[283]*. The evidence of Mr Ishmael is to that effect. In his email of 12/10/2012, Mr Ismael responded to Mr Venter:-

> "On the collateral security over the Surunda Property, we will not commence legal proceedings once we obtain the mortgage. We will let you know well in advance if we looking at the process or do down that paths..Once this full review is done I can assure you that we will not commence any legal actions over the next 6 months. I think our actions over the last 9 months can assured my statement."

c) The existence of an agreement supported by consideration strongly suggests an intention to enter into a legally binding bargain: Ryan Textile Clothing and Footwear Union of Australia (1996) 2 VR 235, Brooking J A at 251; Atco Contorls Pty Ltd (in Liq) v. Newtronics Pty Ltd (recs and mgrs. Apptd) (in Liq) (2009) 25 VR 411, Warren CJ, Nettle and Mandie JA at [60].

d) Finally, the fact that the precise terms of the mortgage were never settled upon is not determinative of the Claimant's case that when it comes to an agreement for a formal mortgage the courts have long proceeded in a principle of giving effect to intention,



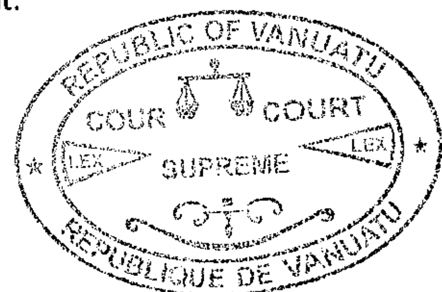
notwithstanding that the terms are vague or indefinite: see *Fisher & Lightwood's Law of Mortgage at pp- 34-35; Martins Agencies Ltd v. Commonwealth Trading Bank of Australia (1986) 84 FLR 71 FOX CJ at 81.*

52. The above circumstances are supported by settled legal principles in respect to the creation of an equitable mortgage. An agreement for good consideration to grant a mortgage over Torrens Title land creates an equitable mortgage over that land: Dixon v. Barton [2011] NSW SC 1525, Ward J at [140]. As explained in Swiss Bank Corporation v. Lloyd Bank Limited [1982] AC 584 AT 594-595:

> "An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter of the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words, evidences a contract to do so. An equitable charge which is said to be created when property is expressly or constructively made liable, or specially appropriated to the discharge of a debt or some other obligation, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver and/or an order for sale."

53. The effect of the provisions of (Vanuatu) Land Leases Act [Cap 63] as amended (the Act) "is to create a regime for the protection of interest of land based on the concept of the Torrens System, which applies to land in many Pacific jurisdictions. However, the Vanuatu Act has the particular features of applying to leasehold estates and interests only. Only indigenous persons can own land but that land may be leased to other persons" [see the Court of Appeal's *Judgment in Huang Xiao Ling v Leong [2013] VUCA 15 at [25]*, citing with approval statements to similar effect in *Ratua Developments Ltd v. Ndai [2007] 123.*

54. In *ANZ Bank (Vanuatu) Ltd v. Belmonte Investments Ltd [2015] VUSC 40,* Fatiaki J expressly recognised the existence of an equitable mortgage within the framework of the Act at [22] to [24] and I echoed that judicial sentiment:



22. "mortgage" is defined in the Act as: " an interest in a registered lease given as security for the payment for the money...and includes the instrument creating the mortgage"... The "interest" created by a mortgage as opposed to the lease over which it is created need <u>not</u> be "registered."

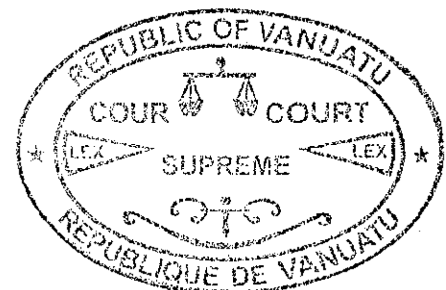
23. ....only a "proprietor" of a registered lease can create a mortgage over it and a mortgage is not "completed" until it is registered...unless and until a mortgage is registered it gives rise to contractual obligations and equitable interests but is unenforceable as a security under sections 58 and 59 of the Act.

24. Plainly the execution date of the Third Party Mortgage although significant in creating contractual rights is...immaterial, in the context of the Land Leases Act which is based on registration."

55. The Claimant relies on the passages of the above case in *ANZ Bank (Vanuatu) Ltd v. Belmonte Investments Ltd* to seek specific performance of its agreement with the Defendants in (Issue No.2) in order that in addition to the contractual rights between the parties, the mortgage will be capable of being registered (and therefore enforceable) under the provisions of the Act.

56. It is to be noted that equitable mortgages of the property of legal owners are created by some instrument or act which is insufficient to confer a legal estate or title, by which, being founded on valuable consideration, shows the intention of the parties to create a present security, or in other words, evidences a contract to do so: Seddon and Ellinghaws Cheshire & Fifoot's Law of Contract (Lexis Nexis Butterworths, Sydney, 2008, 9th ed) at p.34. it has been held that equitable mortgages can exist within the framework of the laws relating to land in Vanuatu: see Luthieve v. Kam [1984] VUSC 9; [1980 – 1994] Van LR 116 and ANZ Bank (Vanuatu) Ltd. v. Belmonte Investments Ltd. ibid.

57. The defendants plead in their defence (at paragraph 4d), among other matters, that the claimant's request for them to provide a mortgage over Surunda Property was never



agreed unconditionally. They say there are three conditions in the 13 November 2012 email namely:

a) the purpose of the mortgage;

b) when it can be released; and

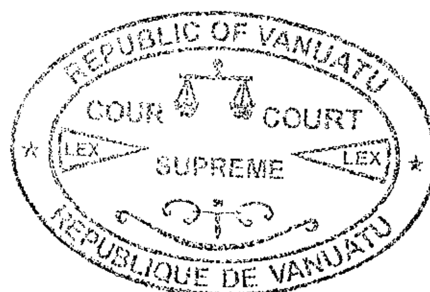
c) that Matilda's section will be excluded.

58. As to the purpose of the mortgage, I accept that having regard to all of the above evidence that the only conclusion is that the defendants knew that the purpose for which the claimant required the collateral mortgage over the Surunda Property was to provide it with additional security given the default by Lope Lope in respect of its facilities and also the Bank's concerns that it was under-secured in respect of the facilities advanced to Lope Lope and that is why the defendants agreed to give the mortgage to the claimant.

59. As to when the mortgage can be released, I accept the submission that as implied by the operation of law as an incident of the loan agreements and the mortgage as varied, over the Lope Lope title, Clause 1 of the Schedule to the mortgage that was prepared and forwarded to the defendants under the claimant's 3 July 2013 letter included a provision that prior to the enforcement of the mortgage it was necessary for a demand to be made in writing. Mr. Venter admitted that he knew of this in cross-examination. From the terms of the Third Party Mortgage (Collateral) it could only be released once the underlying debt owed by the claimant's customer, Lope Lope, was settled in full.

60. As to the third condition that Matilda's section will be excluded, was a reference by Mr. Venter to the defendants' purported agreement to sell part of the defendant's title to his sister, Matilda Cole, however, any such agreement with Mrs. Cole was never capable of being completed as the defendants' title has never been sub-divided.

61. Further, I agree and accept that, as a matter of law, one cannot "exclude a section" from a registered lease before a mortgage is granted over that registered title. The only way of "excluding a section" would be to surrender the registered title and then sub-divided titles. There is no evidence that that has even occurred in relation to the Surunda



Property. Mr. Venter accepted that in cross-examination. In all the circumstances, the condition in the 13 November 2012 email "that Matilda's section will be excluded" was never capable of being achieved as a matter of law. That condition in the 13 November 2012 email can be and is disregarded.

62. On the evidence, however, the terms of the Third Party Mortgage prepared by the claimant's solicitors and forwarded by cover letter to the defendants dated 3 July 2013 were not vague or indefinite, to the contrary they were clear and definite.

63. In the present case, the elements of formation of a contract being agreement (offer and accepted); consideration; intention to create legal relations; and certainty of terms, are identified and therefore present.

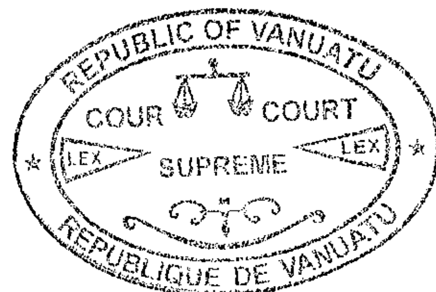
64. The Court is satisfied that the 13 November 2012 email is sufficient to satisfy the writing requirement of s.40 of the Law of Property Act 1925 (UK) that has application as part of the law of Vanuatu. (See the Vanuatu Court of Appeal in Nutley v Kam [2003] VUCA 29). That provision provides:

No action may be brought upon any contract for sale or other disposition of land or any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

65. The Court is satisfied that the evidence established the defendants agree to provide a mortgage to the claimant over Leasehold Title 04/2642/001. The answer to Issue No.1 is in the affirmative (yes).

<u>ISSUE NO.2: Is the Defendants' agreement to provide a Mortgage specifically enforceable?</u>

66. The Defendants submit that in the present case, there was no existence of an agreement for a third party mortgage which enable the Claimant to pursue specific enforcement (*Turner –v- Baldin (1951) 82 CLR 463*).



67. On the whole consideration of the evidence, the Court is satisfied that there was an agreement between the parties for the Defendants to provide a mortgage in its answer to Issue No.1.

68. The next question is whether the agreement was specifically enforceable?

69. I will answer affirmatively to this Issue No.2 given my answer to Issue No.1.

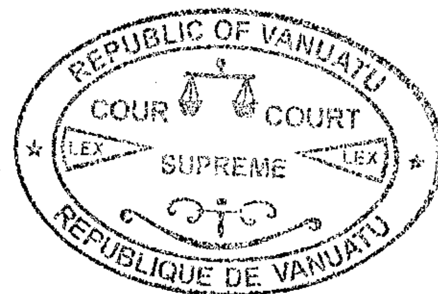
70. If, I am wrong with the answer I have given above, I need to consider the evidence and submissions on the doctrine of part performance.

71. The Defendants say that any claim by the Claimants to enforce security to cover defaults pertaining to Lope Lope Adventure Lodge Limited ("the Company") was redeemed as at date of the mortgage in possession order made on 26 August 2016 and becoming effective on or about 26 November 2014.

72. The above submission is incorrect as a matter of law. The equity of redemption does not arise when mortgage power of sale orders are made by the Supreme Court. Instead, the right is only extinguished on completion of the contract by the delivery of a valid conveyance or transfer to the purchaser. [Reference is made to the Mortgagee's Power of Sale, Croft, Butterworth's, 1980, a copy of which is attached to the claimant's submissions].

73. The Defendants submit that there were alternative causes of action available to the Claimant in the form of personal indemnity and guarantee.

74. As a matter of sense and logic, I agree and I accept the Claimant's submissions that it is irrelevant to the triable issues in this proceeding whether there were alternative causes of action available to the Claimant. The fact that the Claimant holds an executed guarantee and indemnity from the Defendants is no answer to the Claimant's Claim for specific performance in this proceeding to obtain a third party mortgage over Surunda Property. It is the Claimant's choice to proceed how it wishes to enforce the debt owing to it. It is understandable as it is far preferable for the Claimant to obtain a registered security over Surunda Property rather than seeking to enforce liability pursuant to a



guarantee for an unsecured debt of the Defendants' to be executed against their personal property, if any.

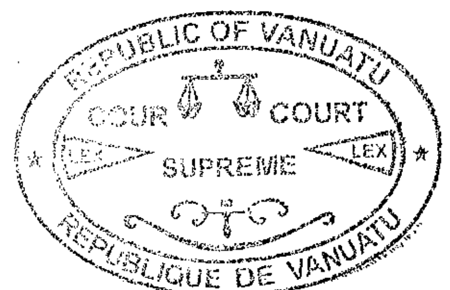
75. It is advanced on behalf of the Defendants that there was a contract for sale and purchase of the Surunda Property on foot that the Claimant was aware of since May 2012 and same was varied pending amendment of the Surunda Property proprietor into the names of the Defendants and this is shown in the delay to obtain an execution of the mortgage.

76. It is to be noted that the fact that the contract for sale and purchase of the Surunda Property dated 2 May 2012 did not proceed was not as a result of the Claimant's cautions.

77. The Defendants say further that there were no funds advanced by the Claimant to the supposed agreement to provide third party mortgage and any such consideration (if any) was past consideration. (*Pacific Autronics Ltd –v- Spectrum Investments Ltd [2012] VUSC 55).*

78. The evidence shows that it is untrue that there were no funds advanced by the Claimant to the Company (Lope Lope) pursuant to the agreement in the 13 November 2012 email from Mr Venter to provide third party mortgage over the Surunda Property. Mr Venter admitted in cross-examination that the Claimant had advanced funds to Lope Lope and Mr Venter knew that the Claimant was seeking third party security over the Surunda Property as additional security in respect of those advances given that the Claimant took the view that it was under –secured.

79. In the context of part performance of contracts of sale or lease of land, it is necessary and sufficient for the plaintiff to establish acts on his part that are "unequivocally and in their own nature referable to some contract of the general nature of that alleged": Regent v Millett (1976) 133 CLR 679 at 683. Cases on contracts for sale of land or lease of land apply by analogy to the enforcement of agreements creating securities: Ciaglia v Ciaglia (2010) 269 ALR 175, [87]; [2010] NSWSC 341 where White J stated at [87]:



"Cases on contracts for the sale or lease of land apply by analogy to the enforcement of agreement creating securities, but the nature of the acts which suffice as acts of part performance differ, because the subject matter of the latter class of agreements is not the ownership or possession of land, but the debt to be repaid and the security to be taken (Cooney v Burns [1922] HCA 8; (1922) 30 CLR 216 at 141-242; Theodore v Mistford Pty Ltd (2005) HCA 45; (2005) 221 CLR 612 at 623 [28]."

In the present case, the evidence is that the mortgage was a Third Party Mortgage (collateral), the principal sum of VT181, 200, 000 having already advanced to Lope Lope (as Mr Venter accepted) and secured by a Mortgage by Lope Lope, as varied, over its title no. 04/2642/001.

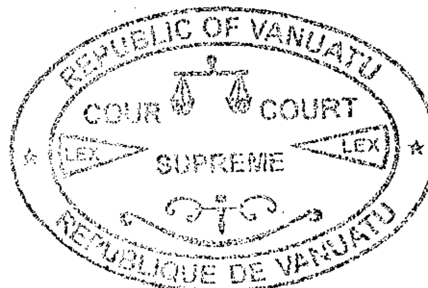
80. An agreement to execute a mortgage will ordinarily be specifically enforced if the mortgagee has already advanced the monies either before or at the time of the enforceable agreement. As Young CJ in Eq stated in *Takemuro v National Australia Bank Ltd [2003] NSWSC 339 at [17]*:

" The equity to grant specific performance comes from the maxim that equity looks on that as done which ought to be done, but also from a line of cases which indicate that equity rarely decline to grant specific performance where a contract has been executed on one side: see *Wight v Maberdan Pty Ltd [1984] 2 NSWLR 230. In Hart v Hart (1881) 18 Ch D670, 685, Kay J* said:

"When an agreement for valuable consideration...has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance."

81. In so far as the Defendants rely on the passage from Mc Intosh v Dalwood (1930) 30SR (NSW) 415, as stated in Fisher & Light Wood's Law of Mortgage at pp 36-37:

"Especially in Australia, it has been recognised in more recent times that, commercially speaking, damages may not be an adequate remedy for a breach of a promise to give a mortgage and that accordingly, specific performance should in appropriate



circumstances be decreed. The first case to state this clearly was *Wight v Haberdan Pty Ltd [1984] 3 NSWLR 280*; see also *Corpers (No.664) Pty VNZI Securities Australia Ltd (1989) NSW CONVR 55-475; Australia and New Zealand Banking Groups Ltd v Widin (1990) 26FCR 21; Bridge Wholesale Acceptance CORP (Australia) Pty Ltd {1991} ACL Rep 295 NSW4."*

Even before the recent developments just referred to, specific performance of an enforceable contract to give security was ordered where the loan has actually been made or the debt or other obligation incurred. This was because a mere claim to damages or repayments was obviously less valuable than a security in the event of a debtor's insolvency: *Swiss Banl Corp v Lloyds Bank Ltd [1982] AC 584, especially at 595 and Thames Quaranty Ltd v Campbell [1985] QB 210*. See also Morthcote, Fry on Specific Performance 6th ed, Stevens, London 1921, pp24 and Albury's Laws of England, 4th ed, Vol 32, para 346.

I accept that there is no reason why this should not also be legal position in Vanuatu.

82. In respect to the Defendant's submission about the "past consideration" and its reliance on the passage from *Pacific Autronics Ltd v Spectrum Investments Ltd [2014] VUSC 55*, it was rejected by Fatiaki J.

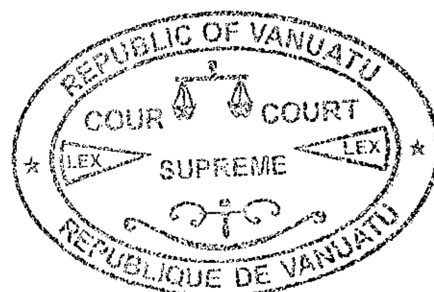
83. In this case, the consideration for the agreement of 13 November 2012 was the loan advances to Lope Lope which, it was conceded by Mr Venter, were in default coupled with the Claimant's forbearance to sue Lope Lope. The past consideration had not elapsed.

84. In the present case, the Court is satisfied on the evidence, the submissions and the strength of authorities provided by the Claimant that the Court ought to do its utmost to carry out the agreement by a decree for specific performance.

85. I answer issue No 2 in the affirmative (yes).

<u>ISSUE NO.3: Counter- Claim</u>

<u>a) Did the Claimant have grounds to lodge a caution against the Surunda Property?</u>

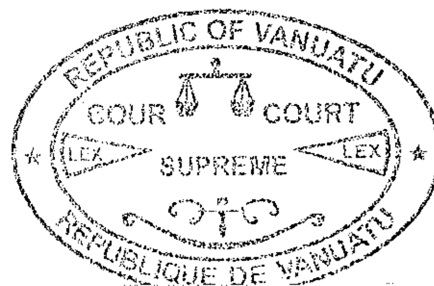


86. This was not the effect of all the evidence on behalf of the Claimant. It is also contrary to the evidence given by the Defendants. The Claimant's cautions were not the reason for the Defendants not sub-dividing the Surunda Property. It is clear from the evidence that Mrs Cole gave in paragraph 29 and 30 of her sworn statement (Exh. D19), the answers she gave in cross-examination and also the answers that Mr Venter gave in cross-examination and in his re-examination that the reason why the 2 May 2012 Agreement did not proceed was to do with the issues concerning negotiations with the custom owners to extend the Surunda Property title and also the custom owners were involved in a dispute before the Courts.

87. Mr Venter agreed in cross-examination that in respect of both the 2 May 2012 Agreement and the variation of it dated 13 September 2013, he could not produce any evidence that he had written to the custom owners regarding the price at which the Surunda Property was intended to be transferred. This was a breach of the requirements in Clause 7 of the Schedule to the Lease (Exhibit C3). That breach had nothing to do with any of the cautions lodged by the Claimant.

88. The cautions were not the reason why Lope Lope failed to make payments to the Claimant. Between the Claimant's lodgement of its first caution dated 30 September 2013, the Defendants took no steps to have that caution removed. Between the time of registration of the Claimant's second caution dated 10 October 2014, the Defendant's took no steps to have it removed until their letter dated 16 July 2015.

89. It is noted that the taking of legal advice is relevant when looking at the issue of whether a caution was lodged without reasonable cause and "a [cautioner] who does not obtain legal advice that he has an arguable case for the existence of a [cautionable] interest will almost certainly be considered to have had reasonable grounds for an honest belief that he did have a [cautionable] interest": *Lindsay, Caveats Against Dealings in Australia and New Zealand (Federation Press, Sydney, 1995)p. 238*; see also *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd (2007) 35 WAR 27; [2007] WASCA179, at [97] Ross JA* citing with approval the decision of the Full Court of the Supreme Court of Western Australia in *Bolton v Excell (1993) ANZ CONVR J62.*



90. In this case, the Claimant received legal advice in relation to its first caution dated 30 September 2013 and based on that advice withdrew it and lodged its second caution dated 10 October 2014. This was contained in George Vasaris & CO's letter to the Claimant dated 10 October 2014 (Exh.C5).

91. In this case, the Claimant had grounds to lodge a caution against the Surunda Property.

<u>If so, are they entitled to relief under s.97 (5) of the Land Leases Act?</u>

92. There is no evidence of any damage caused by the lodgement of the cautions by the Claimants. I answer this issue in the negative (No).

Based on the facts and circumstances of this case, the reference to *Inter-Pacific Investments Ltd v Sulis [2007] VUSC 6*, does not assist the Defendants.

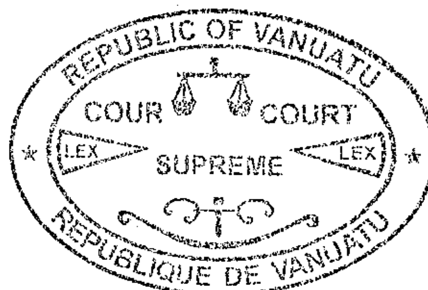
<u>Alternatively, have the Claimants breached fiduciary duties to the Defendants?</u>

93. The Defendants submit that the Claimant owed a fiduciary duty to the Defendants and was in breach of same by registering the caution which had no standing as required under s.93 of the Land Leases Act consequently inhibiting any dealings with the Surunda Property and causing the Defendants to suffer loss. The Defendants rely on *Terence Golby & Anor v Common Wealth Bank of Australia [1996] FCA 1136 (24 December 1996).*

94. The Claimant submits that the answer is no. There is no such fiduciary duty as alleged by the Defendants in support of any alleged fiduciary duty is set out in the final paragraph of the Defendant's submissions being a reference to the Federal Court of Australia's case of Terrance Golby & Anor v Common Wealth Bank of Australia [1996] FCA 1136. The passage referred to in that paragraph of the Defendants' submissions shows that:

> "Absent some special feature, such as the giving of advice in Smith, there is no reason to erect a fiduciary relationship between banks and customers when that relationship is essentially one founded in contract."

95. In the present case, there is no special feature arises. The Claimant refers on its contractual relationship between firstly, itself and Lope Lope and secondly, its agreement with the Defendants as set out in the 13 November 2012 email for the



Defendants to provide a third party security over the Surunda Property. Further, by reason of that agreement and the part performance of it, the Defendants granted to the Claimant an equitable mortgage over the Surunda Property in respect of which the Claimant seeks specific performance.

96. I answer this question in the negative (No).

97. The Court is satisfied that the evidence establishes that it is appropriate to grant the primary relief sought by the Claimant.

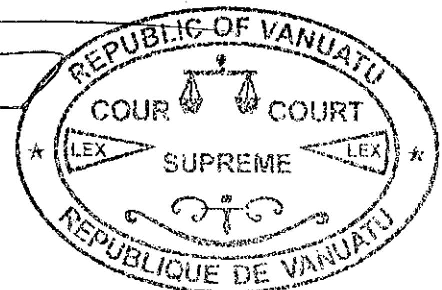
98. The Court makes the following Orders:

1. An order for specific performance directing the Defendants to perform the Agreement between the Claimant and the Defendants, by executing and perfecting a Third Party Mortgage (Collateral) between the Claimant, as Mortgagee, the Company, as Customer, and the Defendants, as Mortgagors, for the principal sum of VT 181, 200, 000 in favour of the Claimant, is implicate, and deliver up same to the Claimant's Solicitors, George Vasaris & CO.

2. An order that the Defendants execute all necessary consent applications to obtain Lessor's consent to enable registration of the Mortgage referred to in paragraph 1 hereof and take the expeditious registration of the said Mortgage.

3. The Defendants are ordered to pay the costs of and incidental to this proceeding on standard basis.

Dated at Port-Vila, this 30 day of August 2017
BY THE COURT



Vincent LUNABEK
Chief Justice