IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU **Civil Case No. 18/815 SC/CIVL**

BETWEEN: SERAH KEKEI

Appellant

AND: BRED (VANUATU) Ltd

Respondent

Hearing: *4th May 2018*
Before: *Justice Chetwynd*
Counsel: *Mr Saling Stephens for the Appellant*
Ms Stephanie Mahuk for the Respondent

JUDGMENT

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1. This is an appeal against an order of the Master dated 30 November 2017. The order made at that time was what is commonly known as a mortgagee sale order. This entitled the respondent in this appeal, Bred (Vanuatu) Ltd, ("the Bank") to take possession of the appellant's property and to sell it. The order was made pursuant to sections 58 and 59 of the Land Leases Act [Cap.163]. Those sections read:

> ***58. Action for recovery of debt***
>
> *Any principal sum or interest due under a mortgage may, subject to the provisions of section 59(4), be recovered by action in any competent court.*
>
> ***59. Enforcement of mortgages***
>
> *(1) Except as provided in section 46 a mortgage shall be enforced upon application to the Court and not otherwise.*
>
> *Upon any such application, the Court may make an order –*
>
> *(a) empowering the mortgagee or any other specified person to sell and transfer the mortgaged lease, and providing for the manner in which the sale is to be effected and the proceeds of the sale applied;*
>
> *(b) empowering the mortgagee or any other specified person to enter on the land and act in all respects in the place and on behalf of the proprietor of the*

lease for a specified period and providing for the application of any moneys received by him while so acting; or

(c) vesting the lease in the mortgagee or any person either absolutely or upon such terms as it thinks fit but such order shall, subject to subsection (5), not take effect until registration thereof.

(3) The Court shall, in exercising its jurisdiction under this section, take into consideration any action brought under section 58 and the results thereof.

(4) After the Court has made an order under paragraphs (a) or (c) of subsection (2) or while an order under paragraph (b) of subsection (2) is in force, no action may be commenced or judgment obtained under section 58 in respect of the mortgage except with the leave of the Court and subject to such conditions (if any) as the Court may impose.

(5) Any order made by the Court under this section shall for the purposes of subsection (4) be effective from the time when it is made.

2. There is no dispute that the appellant took out a mortgage with the Bank as security for a loan. The statutory power of sale as set out above is referred to at clause 8 in the mortgage deed signed by the appellant. There is no dispute that the appellant was, and still is, in arrears with payments in respect of the mortgage. There is no dispute that the Bank served the appellant with a notice of demand to repay the money owing under the mortgage. In fact there appears to have been evidence before the Master of several demands. Despite these notices the appellant did not repay all that was owed and the Bank commenced proceedings pursuant to sections 58 and 59 of the Land Leases Act. Those proceedings resulted in the order now being appealed.

3. The notice of appeal was not filed until the 21st March 2018. The appellant therefore seeks leave to appeal out of time. The accepted procedure in such circumstances is that the application for leave is dealt with at the same time as the merits of the appeal are considered. The reason for this is that the merits of the appeal more often than not have a bearing on whether the court should grant leave.

4. The notice of appeal contains three main grounds of appeal. The first is that the Master had no power to make the order under section 59 of the Land Leases Act. The second ground says that the Master was wrong in any event to grant the order because the appellant had made an arrangement with the mortgagee, the Bank. The third ground submits that the Master was wrong to grant the order because the arrangement referred to above was being honoured by the appellant.

5. The position of Master was originally set up by section 42 of the Judicial Services and Courts Act 2000. By an amending act in 2003 section 42 was repealed. By the Judicial Services and Courts (Amendment) Act 2008, section 42 was reinstated. Section 42 requires an appeal from the Master to be dealt with by a judge of the Supreme Court:

(4) A person may appeal to a judge of the Supreme Court against a decision of the master or a deputy master made under paragraphs (3)(a) and (b). The appeal is to proceed by way of a hearing de novo and the judge's decision on appeal is final.

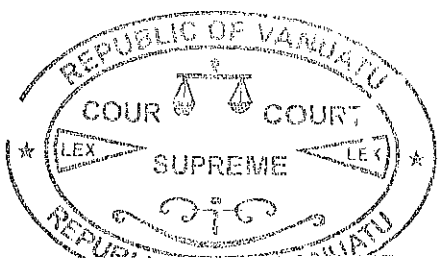
6. Bearing in mind the reference to a hearing *de novo* I propose to look at the grounds, and the submissions in respect of those grounds, stating that there was an arrangement in place which was being honoured by the appellant and which meant the Master should have not made the order she did.

7. It is clear from the evidence before the Master and in particular the sworn statement filed on the 7th of November, 2017 by Frederic Bellevegue that there was a tentative arrangement between the Bank and the appellant. The arrangement was that rent being paid to the appellant of VT60,000 per month was to be paid to the bank. The evidence shows that rent was paid directly into the appellant's bank account but it also shows that the appellant drew on that money so that the Bank did not have the full benefit of the rent being paid to the appellant.

8. It is also clear that at a conference held on the 21st September 2017 the Master advised the appellant to enter into discussions with the bank. One of the reasons why the Master suggested such was because even if the full amount of VT 60,000 was able to be utilised by the Bank it would only result in continuing arrears being paid and outstanding arrears would remain. At the time of the conference the outstanding arrears amounted to VT 647,917 with interest accruing at the daily rate of VT 1,412.

9. The appellant has expressed surprise at the amount of the arrears outstanding and has queried the increase due to the addition of costs. The bank was perfectly entitled to recover all its legal costs and expenses as is provided for in clause 16 of the mortgage deed and at paragraph 4 in the terms and conditions. Because of the provisions in the mortgage deed and the terms and conditions the bank does not need an order of the Court that the appellant pays legal costs. There is no need for the Bank to have its costs taxed. The appellant does imply the costs claimed are not reasonable but does not put forward any reasons why that is so. The legal proceedings in this matter date back to 2015 and include an abortive appeal to the Court of Appeal. These protracted legal proceedings no doubt have meant the Bank has incurred substantial legal costs. The Bank is perfectly entitled to recover those costs and whilst they may be more than it could have recovered if they had been taxed there is no evidence put forward that they are unreasonable.

10. There is no merit in the grounds of appeal suggesting that the order was made in the face of agreements made between the parties and being been honoured by the appellant. The Master would have had no doubt the agreement was not being honoured by the appellant. The Master would also have been in no doubt and that arrears remained unpaid, that the appellant was aware of those arrears and that there was no realistic proposal being put forward to pay them.



11. In any event, in this appeal the appellant's counsel sought to rely more heavily on the ground that the Master had no authority to make an order pursuant to section 58 of the Land Leases Act. He argued that any order which results in the statutory power of sale being effective can only be made by the court. The appellant submits the reference to "the court" must mean the Supreme Court. In that he is correct because it is plain from the definition in section one of the act that "the court" means the Supreme Court.

12. The appellant submits that according to the Constitution the Supreme Court shall consist of a Chief Justice and three other judges. In fact, there has been an amendment to the Constitution which say is the Supreme Court shall consist of a Chief Justice and no more than 12 other judges. The appellant expands on his argument by saying the Master, in accordance with the Judicial Services and Courts Act, is only appointed by the Judicial Services Commission whereas judges are appointed by the President. This means, according to the appellant, the Master is not part of the Supreme Court.

13. This argument is misconceived. The Judicial Services and Courts Act makes it plain that it is;

> *An Act to provide for the independence of the Judicial Service, the functions and powers of the Judicial Service Commission in addition to those in the Constitution, the Courts of the Republic of Vanuatu, and for related purposes.*

In short, when considering those matters one cannot simply refer to and rely on the Constitution in isolation.

14. Section 42 of the Judicial Services and Courts Act provides for the appointment of Master and says that the Master may exercise such of the powers, functions and jurisdiction of the Supreme Court as may be prescribed by the rules of court. In December 2015 the Chief Justice published a Practice Direction which set out the Master's jurisdiction. I do not accept the appellant's description of that Practice Direction as, *"only a rule made by a public servant which purports to amend or alter the legislative framework as in envisaged in section 59 of the Land Leases act".*

15. The Practice Direction is a clear statement of the jurisdiction of the Master as prescribed by section 42 of the Judicial Services and Courts Act.

16. There is no merit in the argument put forward on behalf of the appellant. There is absolutely no doubt that the Master is a part of the Supreme Court, is the Master of the Supreme Court, and therefore in accordance with the rules of court can make orders pursuant to sections 58 and 59 of the Land Leases Act.

17. The reason put forward by the appellant for the delay in lodging the notice of appeal against the Master's order seems simply to be that it was over the Christmas period and her lawyer's office was closed. That does not seem to be a compelling reason to grant leave to appeal out of time. If there had been any merit in the appeal

I could perhaps accept that relief might be granted in such circumstances but as there is no merit at all in any of the grounds of appeal, leave is refused. I would add that even if leave were to be granted the appeal would be dismissed as it is devoid of any merit and is totally misconceived.

19. I have no need to make any order for costs because, as explained above, the provisions in the mortgage deed and the terms and conditions accepted by the appellant mean that Bred (Vanuatu) Ltd, as mortgagee, can recover all the costs of enforcement and maintenance of its security from the sale proceeds (see paragraph 4(b)(ii) of the Terms and Conditions and clause 16 of the Mortgage Deed) meaning, in simple terms, those costs are added to the mortgage debt. The appellant can seek the Court's assistance if she believes the legal costs to be unreasonable but she must bear in mind that this is not the same as asking the Court to tax the Bank's costs. In order to challenge the costs she would have to provide credible evidence that the costs were not reasonable, that is that not what any reasonable lawyer would charge their client in the circumstances. The costs are in effect indemnity costs and are being paid to the mortgagee, not the mortgagee's legal representative.

Dated at Port Vila this 7th May 2018

Chetwynd J

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