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

Civil
Case No. 1132 of 2019

BETWEEN: NATIONAL BANK OF VANUATU LIMITED
Claimant

AND: 1. SETARIKI WAQANITOKA
2. HILLARY WAQANITOKA
Defendants

Date of hearing: *9th September, 2019*
Delivered: *17th October, 2019*
Before: *The Master Cybelle Cenac-Dantes*
In Attendance: *Nigel Morrison counsel for the claimant, Defendants absent and unrepresented*

JUDGMENT

Headnote
Power of sale order - Land Leases Act - Procedure to request a power of sale order - Interpretation of Sections 58 and 59 of The Land Leases Act

INTRODUCTION

This judgment is not to determine the facts of this case but simply to outline what the court considers the correct procedure for a mortgagee to recover a debt or enforce its mortgage against a mortgagor under sections 58 and 59 of the Land Leases Act (hereinafter referred to as 'the Act') by interpreting the words ***"application"*** and ***"action"*** used in the sections, and consequently, the effect which such an interpretation would have on the formal procedure to be used by the mortgagee.

Over the years the court has never had cause to address its mind to what constituted the correct procedure by which a request for a power of sale order was to come before the court. As a result, the interpretation of the Land Leases Act has been left to the lawyers to assume its meaning.

The question of the interpretation of sections 58 and 59 first arose following my request for all section 59 claims to be transferred to my office under **Practice Direction 1 of 16th December, 2015, paragraph xiii**, giving the Master jurisdiction

to deal with *"Applications for approval of sale in foreclosure proceedings (Enforcement of a Mortgage)"*. Having conveyed this procedure to the Bank Attorneys, and there being collective dissent regarding my interpretation of the law as to the procedure, I submitted to putting my reasons in writing once the argument was presented.

This case was the first hearing of a claim under section 59 of the Act and counsel, objecting to my application of the law, I agreed to provide my reasons.

This case commenced by a claim, requesting an order under Section 59 of the Act for a power of sale to the Bank. There was a sworn statement in support, proof of service of the claim, and proof of service of a Notice of Demand prior to the filing of the claim. There having been no response or defence filed to the claim, counsel requested orders be made which read as section 59 (2) (a-c). I treated the claim as an application under section 59 and granted the requested orders. Counsel objected to my treating the said claim as an application, on the ground that this was the procedure which had always been used and that the Bank had grave concerns about the inadequacy of using an application, with limited service times associated with it, which could later give rise to an appeal on the basis of incorrect procedure and insufficient time to make any objections by way of a defence.

THE LAW

Section 58 of the Act reads as follows:

ACTION FOR RECOVERY OF DEBT

58. 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.

Section 59 follows with:

ENFORCEMENT OF MORTGAGES

59. (1) Except as provided in section 46 a mortgage shall be enforced upon *application* to the Court and not otherwise.

(2) Upon any such application, the Court may make 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.

INTERPRETATION PRINCIPLES

The short title and headings of an Act are only aids to interpretation. They are not to be taken as conclusive if they fundamentally conflict with the ordinary meaning of the words or the mischief of the Act.[1] Since they are all part of the Act considered and passed by Parliament, I do not believe that they can be wholly ignored, and I will therefore start my discourse here.

In looking at the meaning of the words aforementioned, it is not enough to simply address the two words in isolation of the Act. While it is tempting to look just to the words or the section immediately applicable, it would be a disservice to the Act and its mischief to ignore the context within which these sections exist in an effort not to offend the Act and its purpose.[2]

Further, when I speak of context, it is to be taken in the broadest sense to include the mischief which the Act was intended to remedy,[3] together with the literal and ordinary meaning of the words.

I refer here to section 8 of the Interpretation Act [CAP 132] which provides some guidance on the "general principles of interpretation":

> An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

I will also consider consistency of language throughout the Act to determine whether there is comity of meaning that might aid in the interpretation.

APPLICATION OF PRINCIPLES AND DISCUSSION

The short title to the Act identifies in clear words its purpose: **"to provide for the creation and disposition of leases of land, for their registration and for matters connected therewith."** Right away we understand that this Act is set up to deal specifically with leaseholds and their registration and associated dealings. Such associated dealings would include the assignment of mortgages registered against such leaseholds. The Act is divided into very definite Parts, with specific headings associated with each Part. The subject heading to each of the disputed sections is

[1] Silk Bros. Pty Ltd v State Electricity Commn (Vic) (1943) 67 CLR 1
[2] K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 60 ALR 509 at 514
[3] CIC Insurance ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408

instructive. Section 58 provides for the commencing of *"actions for the recovery of a debt"*. Section 59 provides for the *"enforcement of mortgages"*. It would appear obvious then that the two sections, though related, are distinct in the process they engage to (a) recover a debt arising under a mortgage and (b) enforce a mortgage under a power of sale.

A complete reading of the Act admits of approximately 26 uses of the word "application" and only 2 uses of the word "action". The latter is to be found only in section 59. In every instance the former is used in the same context of making a request to the relevant authority stated in that section, e.g. the Director of Lands or the court. In fact, other than section 59 the court has been given power under 2 other sections [71 and 81(3)] to make certain orders following "application" and not "action".

Drafters must be precise in the language used as they do not have the liberty, even for the avoidance of monotony to use interchangeable synonyms. Therefore, it is usually accepted that where words are used consistently in legislation there should be consistency of meaning, and where the word which could have been used was changed, then the understanding is that the legislature's intention was to change the meaning. The case of **Craig Williamson Pty Ltd v Barrowcliff**[4] postulates the view that:

> *"It is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applied especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section."*

It is a rule of interpretation that words should be interpreted in accordance with their customary usage. The word "application" in a legal and court context connotes something markedly different from the word "action." With a literal interpretation of the law, we must look at the meaning of the words used by the drafter to ascertain what his intent was. It is my view therefore, that there is one meaning attached to an "application" and one to "action".

I have attempted to demonstrate that the use of the word "application" throughout the Act is consistently and sufficiently clear. Having looked at the Act in its entirety, in particular, sections 71 and 81(3), with specific reference to the court, and section 46(2) as referenced at section 59(1), I cannot but find, that the word "application" does not admit of different meanings in any part of the Act, and therefore, the burden of showing that there is inconsistency is not discharged.[5]

Consequently, the use of the word "application" in section 59 must, perforce, presume a different meaning to the word "action" in section 58 and section 59(4). "Application" throughout the Act is clearly used to denote a formal request to do or to have something, which is submitted to either an officer of the Lands Department or

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[4] [1915] VLR 450 at 452

[5] Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd [1987] VR 529 at 540

the Court. Therefore, "application" in section 59 is an indication of a decidedly different mode of coming before the court as compared with an "action."

The question therefore is why would the legislators allow two different legal terms to be used in what may appear to be the same process. And if they intended a mortgage to be enforced by "action" then why not carry the use of that word in section 58 to section 59 for continuity of understanding and consistency. The legislators having not done so, we can only assume that it was deliberate, and thereupon, their intention that the two words were not meant to be interchangeable but different in meaning.

Having looked at the terms of the mortgage, one might understand why the legislators would have prescribed two separate procedures pertaining to mortgages falling into default. It is a contractual and fundamental term contained in the mortgage (clauses 5.4, 5.7 and 5.11) that upon default of the mortgagor the mortgagee (the Bank) has the power to sell that property and act as proprietor once certain preconditions are satisfied. Consequent upon that contractually agreed term, a mortgagee has been given the immediate and ready access to the court under section 59 to seek permission, as it were, to enforce that contractual term. The legislators have thus prescribed the use of an application; a speedier and more immediate process within the courts to enforce this term. Section 59 gives effect to the power of sale term contained in the mortgage contract. And so, the process to get such an order must be distinctly different to a procedure that will seek to claim recovery of a debt, which amount must be put to proof.

It is no error that section 59(1) refers to an "application" but sections 58 and 59(4) an "action." It is obvious that the legislators expected the use of those words, with very specific legal and procedural consequences would each invoke a certain process. I am therefore at pains to interpret the word "application" in section 59 to mean anything other than a formal request to the court outside of a claim. I take note of the use of the word "application" at section 46, referenced at section 59(1) of the Act as well, and it is clear in the reading that the intention is not to file a claim under section 46 or its equivalent. The same can be said of sections 71 and 81(3).

I pause here to note, that PD1, paragraph xiii refers to applications for foreclosure and not claims. It is of some assistance therefore that the Chief Justice in drafting his PD recognised and referred to section 59 as an application for foreclosure process.

CASE LAW

The case of **Lulum**[6] addressed the interpretation of the word "may" to mean "shall" once the *"pre-conditions for the exercise of the mortgagee's power of sale"* was established. Once satisfied, the court is bound to grant an order enforcing the mortgage under section 59. It does not have the power to allow any other type of order, such as incremental payments, etc. Such an allowance could only be made under section 58.

[6] [2000] VUCA 7; Civil Appeal Case 06 of 2000 (27th October, 2000)

Were the mortgagee to in fact file a claim under section 59(1) then there would be no cause for subsection 4 to exist, providing for leave to file an "action" under section 58 if there is an existing order in effect under section 59(1). It would then be absurd to interpret "application" to mean "claim" when subsection 4 allows for leave to file a claim. If we were to follow a logical rendering of section 59 as argued by counsel, how could a claim be filed to obtain the power of sale and then leave sought under subsection 4 for a second claim filed under section 58 to commence another claim in the same debt case. Would this not amount to a redundancy? Could this be said to be the true intent of the legislature?

The question begs to be asked therefore. If a mortgagee has already obtained an enforcement order to give effect to his power of sale, why then would he return to court to file an action? The answer could only be so that he may be able to claim the balance of any remaining debt that could not have been realised under the power of sale. This would explain the wording of sections 58 and 59(4) providing for the claim of principal and interest and not a power of sale. Section 59 gives the bank the right to exercise its existing power of sale but only for the property mortgaged. If that property fails to satisfy the debt in full then the mortgagee retains the right to file a full claim, with leave, for the balance of the debt. In so doing, all the debtors property would fall under the jurisdiction of the court and the power of the sheriff if all remaining property is seized.

A mortgagee is therefore faced with the following options when a mortgagor is in default:

1. They can file a claim under section 58, without leave, for principal sum or interest. If no defence is filed they can apply for default judgment under the CPR and thereafter follow the normal enforcement process. If a defence is filed, depending on its content they may be able to file for summary judgment, or
2. They can file a claim under section 58, without leave, and may subsequently request a section 59 order pursuant to section 59(3), or
3. They can file an application for a power of sale order to seize and sell or transfer only the mortgaged property as proprietor, to satisfy the debt, or
4. If the power of sale does not fully satisfy the debt they can seek leave under section 59(4) to file a claim to recover any balance owed. If no defence is filed they can file for default judgment under the CPR and follow the normal enforcement process thereafter. If a defence is filed, depending on its content, they may be able to file for summary judgment.

I see section 59 as merely precautionary. That is, rather than allowing banks to proceed to automatically enforce their power of sale under the terms of the mortgage, the legislators have required the court's intervention to protect the interests of the mortgagor in so far as being given proper notice of the banks demand and their intention to engage the relevant legal process. The court is the neutral arbiter to ascertain that the preconditions have been satisfied. The procedure set out by way of application is a quick and easy way to facilitate this process without there being the commercial detriment that could lie from all the usual delays and time constraints associated with a claim. An application attracts a minimum of 3-7 days' notice, usually depending on court scheduling time. I could easily understand why the legislators opted for a process by application rather than action, as the facts are

often undisputed and uncontested. It is the quickest way to foreclose a property. Even more, one could understand the commercial benefit to both the mortgagor and mortgagee in employing this process, as less time wasted means less interest accumulating to the detriment of both parties.

I do not believe that counsels concern regarding insufficient notice to the mortgagor, with little opportunity to put in a response is well founded. The application process provides notice, as well as allows the mortgagor time to put a response before the court for consideration. The issue is not usually one of insufficient time but no time. It is there that a breach of natural justice would arise. The legislature has merely abridged time by the process legislated, not done away with it.

Further, there is a reason why this procedure is contained in the Land Leases Act. It could only be so in order to facilitate a quicker route to Bank foreclosures. Otherwise, if this entire process was to be facilitated via a claim then this could have easily been done under the existing CPR with no recourse to legislation. The legislators obviously intended to provide a different and quicker avenue to foreclosure. I am of the view that a section 59 order is not a judgment, but merely a license or leave granted to the mortgagee to enforce its existing power of sale once the preconditions have been met. The filing of a claim would have the effect of rendering a judgment granting principal or interest.

In reviewing the leading cases of **ANZ Bank (Vanuatu) Ltd v Lulum**[7], **Asset Management Unit v Bernard Nguyen Van Tang**[8] and **Wilfred v Westpac Banking Corporation**[9], there appears to be an inconsistency in the procedures used. In **Lulum** an originating summons was filed, **AMU** an application and **Wilfred** a claim. In none of these judgments was the issue of procedure raised as a point to be decided by the court. This is what this judgment attempts to do. The fact that the question of procedure was never raised by the court in previous judgments or the like is not a bar to the issue being raised now. Judges rarely deal with the question of form unless it has been specifically raised as a fundamental error which goes to the root of the matter. None of the cases so far has dealt with the question of which form the request is to be brought before the court.

In mentioning the case of **Wilfred**, I find it necessary to render a more detailed account of it, as the obiter statements of the court lend themselves to offering a proper explanation of why the CPR is not the appropriate domain to seek redress under section 59 of the Act. I say this because the referred case dealt with the setting aside of a default judgment of a power of sale granted to the Bank. Part 9.2(1) and 9.3(1) provides, that a default judgment can only be sought for a fixed sum of money. Therefore, had the matter of procedure been raised, either in the Appeal Court or below, and forensically examined, I am certain that the court would have come to the conclusion that Part 9 is the improper method by which to obtain an order in default for a power of sale. This was absolutely recognised by them in their obiter statement that *"such a reading would curtail the operation of Default Judgments which could have an effect on the commercial community but the words*

[7] Supra, n.6
[8] Civil Case No. 69 of 2002, Supreme Court of Vanuatu
[9] [2012] VUCA 31; Civil Appeal 25-12 (12th November, 2012)

of the Rules cannot be ignored and amendment may be required." The court went on to add that as *"the narrow question of interpretation is not a live matter on [the] appeal and [did] not require final resolution in this case,"* they could not proceed further with the comments. In other words, although they upheld the grant, the court recognised that Part 9 was deficient in its ability to offer recourse to Banks seeking power of sale orders or any litigant seeking a non-money order. Had their minds been addressed to it, the court, I am sure, would have come to the ineluctable conclusion that the procedure to obtain a power of sale order was already contained under section 59 the Act by way of application and not default judgment under the CPR.

I will say that when I first came to this jurisdiction and was given responsibility for hearing applications for default judgment, I knew that there was something grossly incorrect in the procedure of Banks applying for default judgment under the CPR for a power of sale. I concluded then, that the only option, following the filing of their claim with no defence was for an application to be filed under section 59 requesting a power of sale order and this was the direction given to all counsel until recently. I no longer accept that this is the correct procedure, particularly in light of sections 58 and 59(4) which make provision for the filing of a claim under specific circumstances. The case of **AMU** is a perfect example when just such a claim would be filed, that is, when the power of sale having been realised proves insufficient to meet the balance of principal and interest.

CONCLUSION

I am aware that the reserve of counsel stems from the general principle that no matter can commence in the courts by way of simple application but must stand on the foundation of a claim. While I completely accept this time honoured premise, I will add that any exception to this could only be eroded by legislation, regulating special rules. This is what the Land Leases Act has in effect done. It has declared that no claim is necessary for a mortgagee to obtain an order to give effect to their power of sale, but that anything more than that would have to be specifically pleaded and proved by way of an action or claim.

My order therefore remains as follows: that the claim herein filed is treated as an application under section 59 of the Act and power of sale order granted in the terms specified in the said section.

BY THE COURT

MASTER