

AND: ANZ Bank (Vanuatu) Limited
Claimant/ Respondent

AND: Hugo Brugger as Trustee for the Family Brugger
& Mettel Trust
First Defendant/ First Applicant

AND: Marcel Andre Brugger and Fabienne Brugger
Second Defendants/ Second Applicants

Before: Justice Oliver A. Saksak

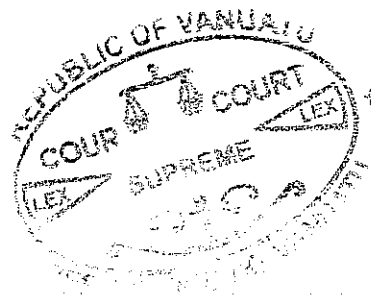
Counsel: Mr Mark Fleming for the First and Second Defendants / Applicants
Mr Mark Hurley for the Claimant/ Respondent

Date of Hearing: 6th September 2023

Date of Decision: 8th September 2023

DECISION

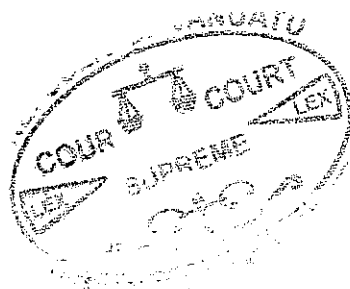
1. On 17th July 2023 the First and Second Defendants filed an urgent application together with a supporting sworn statements of Mr Marcel Brugger.
2. The applicants sought orders-
 - a) To freeze the sale of leases 12/0932/138 (138) and 12/0932/055 (055) obtained by Consent Orders dated 2nd November 2022.
 - b) To join Rimarex Limited as a party to the proceeding.
 - c) To require the Claimant Bank to disclose the sale contracts for the said leases, their valuations from 2018 to date, the names of all persons who tendered for the properties and the grounds for the unsuccessful bidders, particulars and details of reasons given by interested persons and why that person (s) did not proceed, and the marketing particulars.
 - d) To stop the Claimant Bank from taking any further steps in selling either Lease 138 or Lease 055 or preventing the applicants/ defendants operating the Aquana Resort until CC 23/657 has been determined.



3. I heard Mr Fleming at length in relation to the application and the grounds stated in the applications relying on the sworn statement of Mr Brugger and the valuation as attached and his arguments and submissions that in exercising its powers of sale, the ANZ Bank has an equitable duty to act in good faith and to take reasonable care to obtain the best price reasonably obtainable at the time of sale. Mr Fleming relied on the judgment of Tuohy J in the case of Henry Cyrel v National Bank of Vanuatu [2008] VUSC 55, CC 35/2006.
4. Mr Hurley objected to the orders stopping the sale of properties (paragraph 1), to join Rimarex as a party (paragraph 2) and to stop the ANZ Bank from taking further steps until CC 23/657 is determined.
5. Mr Hurley however accepted that the Claimant Bank would be required to disclose the documents and information sought by the applicants in paragraph 3 (a) to (c) respectively. Counsel acknowledged the well-established principles set out in the Cyrel case. As such I have no doubt those principles are being observed and applied by the Claimant Bank in this case.
6. In light of the acceptance by Mr Hurley to the order for disclosure, I allow the application only to that extent. I decline that orders sought in paragraph 1, 2, and 4 of the application.
7. In my view it is too late in the day to stop the sale and to allow Rimarex to be joined as a party as it would make no difference to the case.
8. CC 23/657 is a new proceeding only filed on 10th May 2023. A defence and counterclaim was filed on 17th July 2023 by the First Defendants, Marcel and Fabienne Brugger and by the Republic on 31st August 2023. There has been no listing of the matter as yet. To stop the sale under a Mortgagee power of sale obtained by consent pending the outcome of a new proceeding is irrational and grossly unfair to the Claimant who are entitled to be paid under several loan agreements going back to 2011 (1st April).
9. As at 13th July 2022 the First defendant was indebted to the ANZ Bank in the sum of AUD 2,900,938.74 (inclusive of accrued interest).

By the time CC 23/657 is heard and determined the accrued interest and the total debt would be substantial and enormous. It is for that reason it is unreasonable to grant the orders sought to stop the sale or any further steps that is currently being taken by the Bank to see the matter come to settlement and some finality.

10. The application by the applicants is therefore only successful in part. The orders sought in paragraph 1, 2, and 4 are declined.



11. The orders for disclosure is granted. The claimant is to file a sworn statement disclosing the information sought in paragraph 3 (a) – (e) of the application within 30 days from the date hereof (by 6th October 2023).

DATED at Port Vila this 8th day of September 2023

BY THE COURT

Oliver A. Saksak

Judge

