

IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 15 of 2010

BETWEEN: TCG PROPERTIES LIMITED
Appellant

AND: WESTPAC BANKING CORPORATION
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice O. Saksak
Hon. Justice J. Mansfield
Hon. Justice E. Goldsbrough
Hon. Justice D. Fatiaki

Counsel: The Appellant appeared, by leave, by its director
Mr. M. Hurley for the Respondent

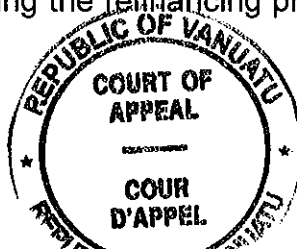
Date of Hearing: 26th November, 2010
Date of Judgment: 3rd December, 2010

JUDGMENT

1. The events to which this appeal (strictly speaking, this application) relate go back to 1999, but the Supreme Court proceeding concerning them commenced only on 27 March 2009, and the judgment under challenge was given on 18 February 2010.

Introduction

2. Mrs. West and her husband Justin West from about 1988 operated certain businesses in Vanuatu. In 1998, they decided in principle to transfer their banking arrangements to Westpac Banking Corporation (Westpac), and they significantly expanded both their business activities and their borrowings. It is not clear how far the transfer of banking arrangements had progressed by 7 June 2000, although it had clearly substantially progressed, apparently informally. There is a letter from Westpac to Mr. West of 5 June 2000 proposing in detail Westpac's terms for supporting the refinancing proposed. Among their business

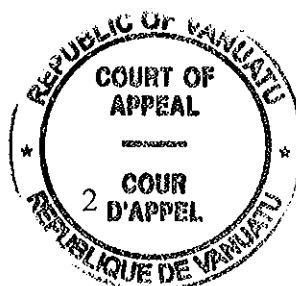


interests were certain leasehold interests in a farm and dwelling property (the properties) in the name TCG Properties Limited (TCG). Mrs. West and Mr. West were the sole shareholders and directors.

3. Mrs. West left Vanuatu on 8 June 2000 for a holiday. Most unfortunately, Mr. West was killed that night. Mrs. West promptly returned to Vanuatu. She then learned that, apparently through one of the businesses managed by Mr. West, significant advances had been made by Westpac and others of which she was not aware. She then spoke to certain officers of Westpac and arranged a meeting to discuss the levels of borrowing. She said to the Court of Appeal, and Westpac apparently accepts, that following her husband's death, Mrs. West is the sole director and shareholder of TCG.

The Refinancing Arrangements

4. By letter of 7 June 2000, which Mrs. West says was signed by her on 13 June 2000, Mrs. West agreed to accept refinancing arrangements including an increased overdraft, new overdrafts and new term facilities variously in Vatu, USD and AUD on certain conditions, including that TCG would guarantee her indebtedness and that it would grant mortgagees over the properties securing her indebtedness. Subsequently on 11 May 2001 TCG formally granted a mortgage and a collateral mortgage in accordance with that arrangement. The mortgages were executed by TCG under its common seal, with Mrs. West signing as its director, and were duly registered over the properties on 8 November 2001. The guarantee was granted by TCG under its common seal, also signed by Mrs. West as its director, on 23 February 2001.
5. That arrangement was reconfirmed by Mrs. West and TCG when Mrs. West received further notices of restructuring of the advances on 15 January 2002, 18 February 2002, and 1 August 2002. She also received letters from Westpac confirming the arrangement on 26 July 2002, 10 November 2003, 1 June 2004, 22 September 2004, 26 January 2005 and 30 March 2005.



6. Westpac then in 2005 decided to take steps to reduce the indebtedness secured by the mortgages as repayments were not being made in accordance with the arrangements. It is not necessary to refer to the action taken by Westpac between 2005 and 2009. On 17 December 2009, Westpac served a formal Notice of Demand on TCG for repayment of all the advances and outstanding interest. The total outstanding was said to be VT68,804,037. TCG did not comply with that Notice of Demand.

The Supreme Court Proceedings

7. Consequently, Westpac brought proceedings in the Supreme Court seeking orders as required by section 59 of the Land Leases Act [Cap 163] that it be permitted to sell the properties under the terms of the two mortgages.
8. TCG, presumably on Mrs. West's instructions, filed a defence disputing the claimed entitlement to sell the properties under the mortgages because, in essence, her signature to the letter of 7 June 2000 was improperly procured, and that the terms of that arrangement and the subsequent correspondence was not properly explained to her or understood by her. Subsequently, TCG also brought a counterclaim disputing that TCG had agreed to accept the terms of the 7 June 2000 letter and that Westpac could not enforce that alleged agreement or the subsequent instruments giving effect to it, as she was not advised by Westpac to seek independent advice before signing them either personally or as the director of TCG, particularly having regard to the circumstances referred to in [3] above.
9. Westpac then applied for summary judgment on its claim, and for the counterclaim to be dismissed summarily, on the grounds that the defence as pleaded was not reasonably arguable and that TCG did not in any event, only as a mortgagor and guarantor, have the standing to bring the counterclaim. (We interpose that, in our provisional view, there was little prospect of Westpac succeeding on the 'standing' contention, as Westpac sought to recover the debt from TCG by its Notice of Demand, and either by its close association with Mrs. West as its sole director and shareholder or by subrogation of her claimed rights it was likely to have had the necessary standing; in any event, the contention

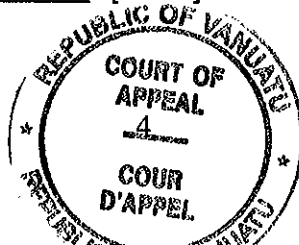


could readily have been met by Mrs. West also becoming a Claimant on the Counterclaim).

10. Ultimately, those interlocutory applications were to be heard on 18 February 2010. In the meantime, detailed sworn statements of evidence had been filed on behalf of Westpac and by Mrs. West.
11. At the commencement of the hearing on 18 February 2010, counsel for TCG accepted that Westpac had the right to sell the properties under the two mortgages. There was therefore no dispute about Westpac being entitled to judgment on its claim. Orders were made accordingly. It appears that no order was made summarily dismissing the counterclaim, so it is still formally before the Court.
12. There was a stay on the exercise of the power of sale, whilst TCG through (Mrs. West) tried to sell the properties or one or other of them privately. That stay lapsed or was rescinded, so Westpac was then able to proceed to execute its power of sale.

The Appeal

13. TCG on 2 July 2010 purported to appeal from the orders of 18 January 2010. The Supreme Court, to avoid the purported appeal being pointless if the properties were sold, stayed the order for sale of the residential property (one of the mortgaged leases only) pending the hearing and determination of the purported appeal.
14. Mrs. West accepts that TCG's appeal is out of time, even accepting that the orders made on 18 February 2010 were final: see Rule 20 of the Court of Appeal Rules 1973. TCG has now also applied for an extension of time within which TCG may appeal from those orders.
15. The proper approach to whether to grant an extension of time to appeal is discussed in Laho Ltd v. QBE Insurance (Vanuatu) Ltd [2003] VUCA 26; and Colmar v. Rose Vanuatu Ltd [2009] VUCA 40 at [41]. There should be

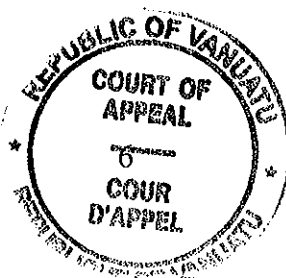


satisfactory evidence as to why the appeal was not instituted within time, and to show that the proposed appeal has arguable prospects of success. The proposed appeal, even if an extension of time to appeal is granted, must fail. In that circumstance, the extension of time to appeal should be refused: Aru v. Vanuatu Brewery Ltd [2002] VUCA 43. In addition, no cogent explanation for why the acknowledgment of counsel for TCG given on 18 February 2010 should be allowed to be withdrawn has been proffered: Dukemaster Pty Ltd v. Bluehive Pty Ltd [2001] FCA 180.

16. The short reason why the appeal, or purported appeal, must fail flows from the circumstances in which the orders were made on 18 February 2010. TCG by its counsel accepted that those orders should be made. TCG did not then assert that the matters alleged in its defence and counterclaim provided an arguable basis for showing that TCG could set aside the two mortgages or the guarantee of the monies advanced to Mrs. West and the interest owing on those advances. The matters referred to in Mrs. West's sworn statement of evidence, apparently at one point intended to be relied upon to assert those matters, were not relied upon.
17. The proposed grounds of appeal do not identify any error or the part of the primary judge in making the orders of 18 February 2010. The Court was entitled to rely upon counsel for TCG to inform it about TCG's final position in response to the claim of Westpac. It was not to oppose the orders sought. The grounds of the proposed appeal briefly repeat the alleged matters upon which the defence and counterclaim were based, but they were not pursued at the hearing. No explanation for why TCG should be allowed to change its mind has been presented.
18. Consequently, the orders of the Court are:
 1. Application for an extension of time within which to appeal from the orders of the Supreme Court made on 18 February 2010 is refused.



2. The order of the Supreme Court of 29 July 2010 staying the operation of the orders of 18 February 2010 in so far as they relate to the residential property on Lease number 11/OX12/001 is discharged.
 3. The applicant pays to the respondent its costs of and incidental to the application for an extension of time to appeal, made on 22 November 2010, and of the purported appeal filed on 2 July 2010 to be taxed or agreed.
 4. The matter is otherwise remitted to the Supreme Court in relation to the outstanding counterclaim.
19. There are two further matters the Court wishes to comment upon.
20. It was apparent from Mrs. West's written and oral submissions that she (or TCG) feels keenly that TCG and she herself were somehow duped by Westpac into signing the letter of 7 June 2000 and the two mortgages and the guarantee. So far as TCG is concerned, that position was available to be, but was not, adopted when the hearing was to take place on 18 February 2010.
21. It is not for the Court to comment upon her views. However, it may properly be observed that, notwithstanding that the counterclaim by TCG formally remains to be dealt with, there was a considerable period of time when TCG and Mrs. West apparently accepted the benefits of the advances made available to her by Westpac. The pressures on her immediately following her husband's death would not have played such a part in her decision making (either for TCG or personally) in 2001 when the two mortgages and the guarantee were signed by TCG. She continued in the following five years or so to accept the funds from Westpac, apparently to an increasing level, and to have the benefit of their use. There is no reason why, if she felt duped by Westpac during the period from 2001, she could not have sought independent legal or financial advice. She may have done so. At least to the extent of the increase in overall indebtedness to Westpac after 2000, she could readily have declined it. She might be expected to account for it to Westpac in any event, even if she can somehow maintain the counterclaim largely based on the events of 13 June 2000. Those observations



are simply to indicate some matters which she will need to consider carefully before taking TCG's or her personal position further.

22. The second matter concerns the representation of TCG on this application. The Court gave leave to Mrs. West to appear for TCG, as its sole director and shareholder, upon the basis of the accepted position that TCG has no resources and would otherwise be unrepresented and had formally resolved to authorize Mrs. West to speak for it and to be bound by and accountable for what she said on its behalf. The usual rule is that a company is required to be represented by, a legal practitioner: Benard v. Vanuatu Investment Promotion Authority [2003] VUCA 3, Re Mannix Ltd [1984] 1 NZLR 309, to ensure that the matter is conducted efficiently and properly. This case should not therefore be seen as establishing any precedent for when the Court may or should permit a company to be represented other than by a legal practitioner. It is a case on its own particular facts.

Dated at Port Vila, this 3rd December, 2010

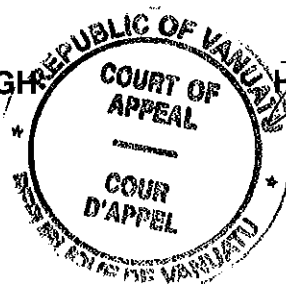
BY THE COURT



Hon. Chief Justice V. LUNABEK


Hon. Justice O. SAKSAK


Hon Justice E. GOLDSBROUGH


Hon. Justice J. MANSFIELD




Hon. Justice D. FATIAKI