

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

Civil Appeal Case No. 14 of 2011

BETWEEN : ANZ BANK (VANUATU) LIMITED
Appellant

AND: MARKSON HEIHEI
First Respondent

AND: RASA LOUIS
Second Respondent

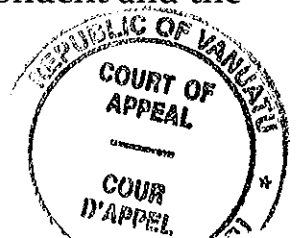
Coram: Hon. Justice John W. von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: Mr. Nigel Morrison for the Appellant
Mr. Eric Molbaleh for the First Respondent
Mr. Colin Leo for the Second Respondent

Date of Hearing: 24th April 2012
Date of Judgment: 4th May 2012

JUDGMENT

1. In 1996 and 1997 Mr. Heihei, the first respondent obtained two loans from ANZ Bank (Vanuatu) Ltd totaling VT2, 700,000. He soon fell into arrears in the repayments due under the two loans. By the time these proceedings came to be heard in the Supreme Court in 2012, the outstanding amount claimed by ANZ was VT14, 744, 006.
2. At trial in the Supreme Court, ANZ sought an order that it be empowered to sell the leasehold title No. 03/oJ74/004 over which it said it had a mortgage because of the default in repayment of the loan. The first respondent and the

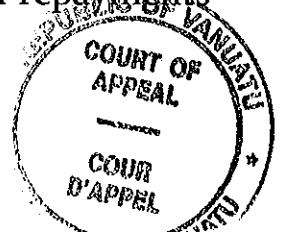


second respondent Mr. Rasa are the registered proprietors of leasehold title 03/oJ74/004. Mr. Heihei in the Supreme Court alleged that the two loans had been repaid by his own payments together with the proceeds of the sale of two vehicles owned by him and sold by ANZ.

3. Mr. Rasa in the Supreme Court denied he had ever signed the mortgage and denied any responsibility to repay Mr. Heihei's loan. He said therefore the mortgage was unenforceable and no order for sale could be made.
4. The Supreme Court dismissed ANZ's case finding:-
 - a) the mortgage was invalid, because it was not proved that Mr. Rasa had signed the mortgage.
 - b) the loans from ANZ to Mr. Heihei had been repaid.
5. ANZ's appeal alleges
 - a) The Judge's conclusion that Mr. Rasa had not signed, did not know about and was not bound by the mortgage was not justified by the facts or the law.
 - b) The Judge erred in failing to take into account the evidence of Dudley Wai.
 - c) The Judge erred in determining that the proceeds of the sale of the motor vehicles was required to be taken into account in assessing whether the mortgage loan had been repaid.

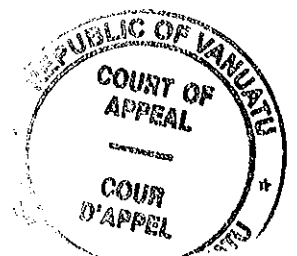
Background

6. In 1996, Mr. Heihei applied to ANZ for a loan of VT1,000,000. This was approved. In 1997 Mr. Heihei applied for another loan this time for VT1,700,000. At that stage ANZ claimed that Mr. Heihei had repaid VT500,000 of the original loan so that his total indebtedness was then VT2,200,000 Mr. Heihei claimed that he had repaid the whole of the first loan of VT1,000,000 by 1997 when he obtained the second loan.
7. ANZ required security before it agreed to the second loan. Mr. Heihei agreed to give them a mortgage with respect to leasehold title No. 03/oJ74/004. The leasehold interest was held by Mr. Heihei and Mr. Rasa. Although the loan was made no mortgage was then entered into. By 1999 the loan repayments



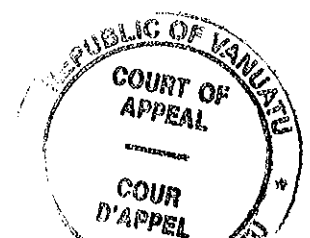
were in arrears. ANZ issued proceedings against Mr. Heihei for the outstanding loan and costs and obtained judgment in the Supreme Court on 21 July 1999 for VT 2, 486, 761.

8. In the meantime, under the same civil case (no. 17 of 1999), ANZ issued an originating summons for an order permitting it to sell the leasehold property as mortgagee.
9. Peter Jones was the ANZ manager at that time. His file notes were available at trial although Mr. Jones had left Vanuatu some time previously. Mr. Jones' notes of his discussion with Mr. Heihei illustrate that by October 1999, the Bank had realized that it did not have any mortgage security. The originating summons of March 1999 seeking to enforce the mortgage therefore could not have possibly succeeded. At the date of the issue of the summons there was no mortgage to enforce.
10. Mr. Jones' notes show further that he met with Mr. Heihei and Mr. Rosa on the 22nd of October 1999. His notes record that Mr. Heihei and Mr. Rosa had decided to sell the property "and are prepared to sign new mortgage documentation" (although there was no existing mortgage documentation).
11. The mortgage document is dated 8 December 1999. It records that both Mr. Heihei and Mr. Rasa signed on 27th October 1999. There is no file note from Mr. Jones that he met the two men on 27th October. Mr. Jones is both the witness to their signatures and has provided the certificate on the mortgage regarding advice to the mortgagors. (We return to this point later in the Judgment.)
12. In 1997, Mr. Heihei signed a lease agreement with respect to a Mitsubishi truck with ANZ as lessor. Mr. Heihei also had an Isuzu truck at this time. In 2000, ANZ sold both these vehicles. At trial, Mr. Heihei claimed that the proceeds of the sale of the two vehicles would have repaid his ANZ loans. ANZ denied this claiming the only amount Mr. Heihei was entitled to was VT350, 000 from the sale of one of the vehicles which had been credited to his mortgage loan account.
13. By 2012, at the Supreme Court hearing the loan, together with interest and payment of ANZ costs and expenses, had grown to over VT14,000,000.



The Supreme Court Judgment

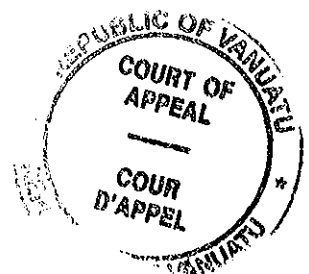
14. The Judge began with a recitation of what can only be described as the tortuous progress of this case from institution in 1999 to trial in 2012 some 13 years later.
15. The first issue addressed by the Judge was whether Mr. Rasa had, in fact, signed the mortgage. Mr. Rasa said in evidence that he had not signed the mortgage and the signature on the mortgage document was not his. Mr. Rasa said he had never seen the documentation relating to Mr. Heihei's loan with ANZ. The Judge noted that the person who had apparently witnessed Mr. Rasa's signature in 1999 was no longer in Vanuatu.
16. The Judge expressed some concern about the detail of the mortgage. He observed;
 - (a) the mortgage had two dates 27th October 1999 and 8th December 1999;
 - (b) Mr. Jones had apparently signed as a Commissioner for Oaths when there was no evidence he was;
 - (c) there was no diary note from Mr. Jones that he saw Mr. Heihei or Mr. Rasa on 27th October 2009 when it was said they signed the mortgage;
 - (d) the loan was a personal loan to Mr. Heihei; and finally,
 - (e) on this aspect of the case the Judge noted the exact amount of the loan and the advance covered by the mortgage were not the same. The Judge was not satisfied Mr. Rasa had signed the mortgage. In those circumstances he concluded that the ANZ had not established the mortgage as valid and enforceable.
17. The Judge also concluded that Mr. Heihei had repaid the loan and so the application to sell the leasehold property should be refused.
18. The Judge said that Mr. Heihei's evidence was that the ANZ had seized two of his motor vehicles. One was sold for VT350,000 which he asserted was at an undervalue. The other vehicle was sold, Mr. Heihei said, by ANZ for VT2,600, 000.



19. The Judge accepted the second vehicle had been sold for VT2, 600, 000 in the absence of any evidence to the contrary from ANZ. Given Mr. Heihei's debt in 2000 was VT1, 751, 899, total the sale of his vehicle for VT 2,600,000 would easily have covered his total indebtedness to the bank.
20. The Judge refused the bank's application given he was not satisfied Mr. Heihei has indebted to ANZ.

Did Mr. Rasa sign the mortgage?

21. We deal firstly with the issue of whether the Judges' finding that Mr. Rasa did not sign the mortgage can be successfully challenged in this Court.
22. The leasehold land is held in joint ownership by Mr. Heihei and Mr. Rasa. Counsel for ANZ accepted that if the signature on the mortgage was not Mr. Rasa's then the mortgage would not be valid at least against Mr. Rasa and that it could not be used as an instrument to sell the respondent's leasehold interest.
23. The Judges' conclusion that he was not satisfied Mr. Rasa had signed the mortgage was based on-
 - a) His acceptance of Mr. Rasa's evidence on this point and
 - b) His finding that there were a number of errors in the mortgage (see 16 of this Judgment).
24. The appellants' case is that first Mr. Rasa did not challenge the terms of the mortgage. However Mr. Rasa's evidence was that he had not signed the mortgage and was therefore never a party to the mortgage. The fact he did not "*challenge*" the terms of the mortgage is therefore hardly relevant.
25. Secondly, the appellant says that shortly after the mortgage was signed Mr. Rasa knew about the mortgage over his (and Mr. Heihei's) land and yet he did not protest to the bank about the mortgage. This claim is primarily based on a letter of 25th October 1999. The letter is addressed to ANZ and, in the letter, Mr. Heihei and Mr. Rasa agree to give ANZ a mortgage over their land if the bank agreed not to enforce a judgment debt awarded in Civil Case No. 17 of 1999 against Mr. Heihei. The letter is signed by both men.



26. ANZ submits this letter illustrates Mr. Rasa agreed to sign the mortgage. Counsel for ANZ accepted that ANZ had drafted the letter of 25th October and had Mr. Heihei and Mr. Rasa sign it. This letter however, must be seen in context.
27. By 25 October, ANZ realized that it did not have a mortgage security for its advance to Mr. Heihei. It had a judgment against Mr. Heihei only. There was no reason for Mr. Rasa to agree to sign any mortgage in ANZ's favour in those circumstances. ANZ could not enforce its Judgment against him. Mr. Jones's file note of 22nd October (see 10 of this judgment) and the letter of 25 October should be seen in light of the bank's concern that it had no security. Further, ANZ pointed to Mr. Rasa's signature on the mortgage itself. As we have said, the Judge was not satisfied Mr. Rasa had signed the mortgage.
28. We are satisfied there were reasons to be concerned about the circumstances under which it was claimed Mr. Rasa had signed the mortgage apart from Mr. Rasa's evidence. As we have already observed, after Judgment was obtained against Mr. Heihei ANZ realized it did not have the mortgage security it thought it had. At this stage there was no reason for Mr. Rasa to sign any such mortgage.
29. Counsel accepted a certificate which stated that the certifier (who had to be a Commissioner of Oaths) knew the person signing the mortgage, that the person had freely signed; and that the person had appeared to understand the mortgage was part of the approved mortgage form.
30. In this case, the certificate had been certified by Mr. Jones, ANZ manager. There was no evidence that he was a Commissioner for Oaths. Nor, in the circumstances, was he an independent person given the bank was anxious to improve the security for its loan by obtaining the mortgage. This was a situation which required Mr. Rasa to have independent advice.
31. In summary, Mr. Rasa had no reason to agree to a mortgage given that ANZ already had judgment against Mr. Heihei in 1999. Mr. Rasa owed no money to the bank. ANZ had neglected to obtain a mortgage security for its loan in 1997 and, by the time of the loan default in 1999, it was anxious to remedy this failure. Mr. Rasa did not receive any independent advice regarding the mortgage. The certificate that said that Mr. Rasa freely signed and

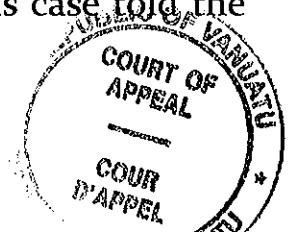


understood the mortgage was certified by the ANZ bank manager and not by a Commissioner for Oaths.

32. We consider therefore the appellant has not shown the Judge was wrong to accept Mr. Rasa's evidence that he did not sign the mortgage. This conclusion by itself is sufficient to dispose of the appeal given ANZ accepted that without a valid signature from Mr. Rasa the mortgage could not be enforced. However we also briefly consider the question of whether the loans to Mr. Heihei were repaid.

Were the ANZ loans repaid?

33. The Judge concluded in any event that ANZ could not prove Mr. Heihei was indebted to ANZ when he claimed the ANZ's sale of the two vehicles belonging to Mr. Heihei had repaid the loan. Whether this issue is still live in view of the judgment of July 1999 (in Civil Case 170 of 1999-see 5 of this judgment) is uncertain. The parties and the Judge appeared to proceed as if liability for the loan to Mr. Heihei by the ANZ was still able to be disputed. We consider the Judge's conclusion on that basis.
34. The evidence called by ANZ at trial in 2012 regarding Mr. Heihei's debt to the ANZ was confused. There were two motor vehicles. One a Mitsubishi truck was the subject of a lease between ANZ and Mr. Heihei. ANZ retained ownership of this vehicle by virtue of the lease.
35. That vehicle was sold by the ANZ in 2000. Mr. Heihei might have been entitled to the net proceeds of sale if the sale price exceeded any arrears of lease payments and the residual value. ANZ took the view at trial (wrongly) that its sale of the two vehicles was irrelevant to the question of whether the mortgage loan had been repaid. As a result, ANZ provided no direct evidence as to the sale of this vehicle nor an accounting under the lease.
36. The other vehicle was an Isuzu truck. It was not clear from the evidence whether, Mr. Heihei owned this truck or whether it was leased, how much the truck was sold for by ANZ, or how it accounted for the proceeds.
37. All that can be confidently said is that with respect to at least one of the trucks, ANZ credited the sum of VT350, 000 to Mr. Heihei's account.
38. The Judge at trial did his best to sort through this confused and confusing evidence. This Court at an earlier hearing of an appeal in this case told the



litigants (Heihe v. The ANZ Bank of Vanuatu Civil Appeal case 35 of 2003.)
“This is a mess which must be sorted out in a disciplined and professional manner which has not yet occurred.”

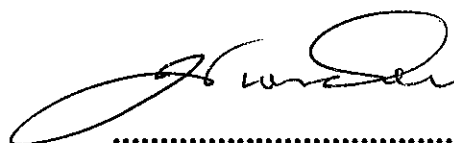
39. Regrettably, the parties took no notice of this observation and the evidence at trial remained a mess. It was primarily the responsibility of the Claimant, ANZ, to ensure the evidence was properly assembled to prove their case. If did not do so.
40. For the reasons given the appeal will be dismissed.

Costs

41. The first and second defendants are entitled to costs for a standard appeal.

DATED at Port Vila this 4th day of May, 2012

BY THE COURT


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Hon. J. W. von Doussa, J

