IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

CIVIL CASE NO. 117 OF 1990

BETWEEN : BANQUE PRIVEE DE CREDIT MODERNE a Bank duly registered in Noumea, New Caledonia and having its established place of business at 21 Rue des Freres Carcopino, Noumea New Caledonia

PLAINTIFF

AND : JET SERVICE LIMITED a company duly registered under the laws of the Republic of Vanuatu and having its registered office situate at Route de Mele, Tagabe, Port Vila Efate, in the Republic of Vanuatu

FIRST DEFENDANT

AND : GERARD LASNIER OF PO Box 128, Port Vila, Efate, in the Republic of Vanuatu

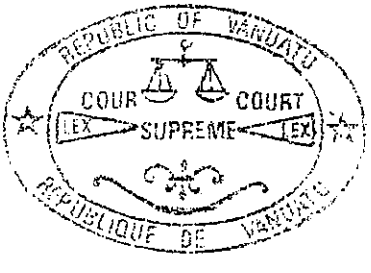
SECOND DEFENDANT

JUDGEMENT

During 1989 the first defendant was owned and operated by a family whose name was Ochida. The second defendant was a car salesman in Noumea, then working for BMW. In the course of his work of selling motor vehicles the second defendant came into contact with a Mr. Oudard who at this time was an employee of the plaintiff bank.

The plaintiff was in Noumea for the purpose, inter alia, of providing credit to individuals to purchase consumables including motor vehicles. As the second defendant was employed as a vendor of motor vehicles it is not therefore surprising that he came into contact with Mr. Oudard.

The second defendant travelled to Vanuatu, and was introduced to one of the owners of the first defendant, who had in mind selling that business. After requesting further particulars the second defendant eventually approached the plaintiff as represented in Noumea by Mr. Oudard with a request for a loan.



This loan became the first of five agreements relating to the business Jet Service Ltd. In total 54,634,670 CPF was transmitted to the bank accounts of Jet Service Ltd. (Lasnier) from the plaintiff.

Late in 1989 Mr. Oudard ceased to be an employee of the plaintiff, was replaced by a Mr. Gros at around the same time as the fifth loan, and thereafter the relationship between the plaintiff and the second defendant deteriorated rapidly.

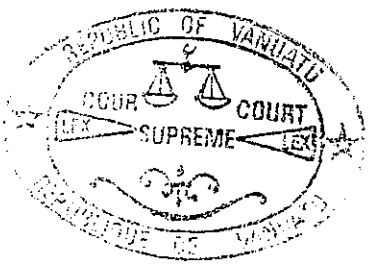
Repayments were missed, negotiations to reach some compromise failed and hence these proceedings.

The issues raised in these proceedings are numerous. In what currency were the loans taken out? Where the breaches in repayment expressly waived by the plaintiff? Was the first loan an illegal loan as being a loan to a company to purchase its own shares? Were all of the loans illegal because the plaintiff had neither a banking nor a business licence in Vanuatu?

Currency is an issue because of the informal nature of the business dealings between the plaintiff when represented by Mr. Oudard and the second defendant whether acting on his own behalf or on behalf of Jet Service Ltd. Evidence was received that the second defendant signed incomplete loan agreements. For such a large investment, indeed for such a large loan, precious few inquiries were made either by the plaintiff of the second defendant. Apart from the evidence of the second defendant of his conversations with the plaintiff's then representative, who of course is now no longer in the employment of the plaintiff, the only other evidence on the currency question comes from the remittances between the plaintiff and the defendants.

In particular it is useful to note that when the first loan agreement came into effect and the sum borrowed was remitted to a bank in Port Vila that amount was not 30 million vatu but 32, 460,201VT. The 2,460,201 in excess of that which the second defendant says he negotiated for was never returned. In evidence he said that when he raised this matter with Mr. Oudard, Mr. Oudard simply told him that he was lucky if the exchange rate had favoured him.

Equally important were the discussions said to have taken place between the plaintiff's representative and the second defendant about the opening of a branch of the plaintiff bank in Port Vila. It seems from those discussions that on the opening of this proposed branch, the loans would become repayable in vatu.



Taking all of this into account and the evidence that some repayments were made in the amount which would be payable if the loan was in CPF (even though the second defendant explained this as a conciliatory gesture) I cannot accept the proposition that the first or indeed any other of these five loans were in any currency other than CPF.

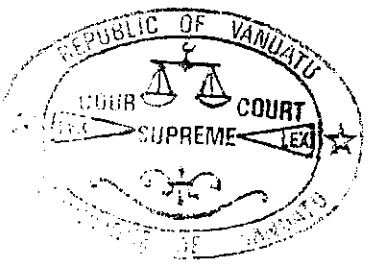
As to the first loan agreement (Ex 1) that is expressed to be between BPCM and Jet Service Ltd. As such it could be said to be a loan to the company itself. If the proceeds of such a loan were to be applied by the company to purchase its own shares, illegality may be pleaded. On its face the loan agreement also suggests that its purpose is to purchase 38 motor vehicles. In fact the money was actually used by the second defendant to buy shares in Jet Service Ltd. from the Ochida family.

Evidence of whether the first loan was between BPCM and Jet SErvice Ltd. or BPCM and the second defendant comes from the second defendant. He gave evidence to the effect that at the time the first loan was negotiated he was not acting for Jet Service Ltd., in which of course at this stage he had no interest. All the other evidence of the negotiations suggest the same. The inescapable conclusion to be drawn from these circumstances is that the first loan agreement was between the plaintiff and the second defendant.

Bearing in mind this finding of fact there is no need to further explore the illegality issue as far as a company borrowing money to buy its own shares and I do not therefore propose to do so here.

I shall however explore the issues of no Banking Licence and no Business Licence as raised by the defendants. The plaintiff is a bank within the excepted meaning of such in France from whence it originates. In Noumea, where the branch from which these five loans emanated, the bank does not trade as a bank but only as a credit house, providing credit facilities without providing the usual facilities of a bank i.e. accepting deposits from the public and running current cheque accounts.

From the evidence of the second defendant there must be an issue as to where some of the loan agreements were sigend. Clearly the first loan agreement was signed in Noumea. Later agreements may have been signed in Port Vila, during Mr. Oudard's visits to Vanuatu. In my opinion the place of signature is of little relevance since the agreements only become effective once approved by the plaintiff through its Noumea branch, even though I have no doubt that the defendants were always assured by the plaintiff's representative that the agreements would be approved.



Assuming for a moment however that the loans were executed in Vanuatu or that the plaintiff was in some other way acting in Vanautu it is worth considering whether the plaintiff's conduct contravenes any provisions of Vanuatu legislation.

Section 2 of Cap 63 Banking provides:-

(1) Notwithstanding the provisions of any other law, no banking business shall, save as hereinafter provided, be carried on in or from within Vanuatu except by a licensed financial institution.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding VT50,000 for each day during which the offence continues.

Section 1 (1) provides definitions for the Act:-

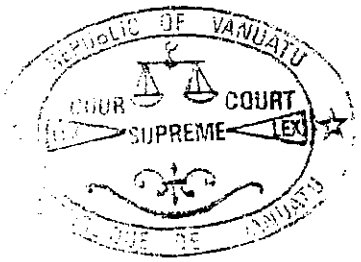
"bank" means any financial institution whose business includes the acceptance of deposits of money withdrawable by cheque;

"banking business" means the business of accepting deposits of money which may be withdrawn or repaid on demand or after a fixed period or after notice and the employment of those deposits in whole or in part by lending or any other means for the account and at the risk of the person accepting such deposits and shall be deemed to include merchant banking business;

"financial institution" means a company which carries on a banking business;

The plaintiff, its full title being Banque Privee de Credit Moderne, is a bank in France, where it accepts deposits as described above. It is not such in New Caledonia, not being or aspiring to be so licensed there. On behalf of the defendants it has been put forward that as BPCM is one corporate entity its activities in France which would constitute banking business under Vanuatu law may be imported from France into the activities of the company in Noumea, or more importantly in this case into Vanuatu, with the result that BPCM may be found to have contravened the banking provisions in Vanuatu.

The activities which may have been carried on in Vanuatu include the signing of loan agreements, the depositing of money from the plaintiff into a current account in Banque Indosuez de Vanuatu, and the chasing of a debt by the plaintiff and an agent it appointed during negotiations who lived in Vanuatu. In addition there is some evidence of the plaintiff's then agent, Mr. Oudard taking some steps preliminary to opening a branch of the plaintiff bank in Port Vila.



I am unable to construe such as coming within the terms of section 2 of Cap 63, where the prohibition is that banking business shall not be carried on "in or from within Vanuatu". Put at its best for the defendants their case does not show a contravention of the provisions in Vanuatu of the banking legislation.

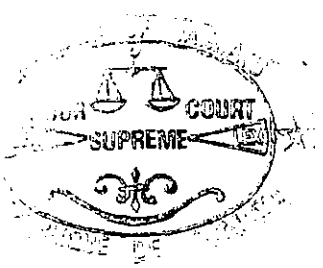
Cap 173 provides for the licensing of businesses. Although the Act itself is not specific on the point one must assume it refers to businesses being carried on in or within Vanuatu. There is to be found in the Act no definition of carrying on a business. Given the ordinary meaning of the words used, to "carry on a business" must imply something more than a single transaction. It is therefore unlikely that the acts complained of by the defendants which may have occurred in Vanuatu would ever constitute carrying on a business as envisaged by the business licence legislation.

Since I find that the prohibitive legislation has not in fact been contravened I do not propose to consider whether the effect of any such contravention were it to have been proved would render any agreements thereunder unenforceable.

It is admitted that the defendants have defaulted in repayment under each of these five loan agreements. Demand notices were served on 5 November 1990. It is submitted on behalf of the defendants that these early breaches of repayment terms had been expressly waived by the plaintiff as represented by Mr. Gros. Evidence of this comes from the second defendant and in correspondence exhibited. This situation arose because the plaintiff at this stage was still prepared to negotiate with the defendants, although now required some security over assets, which the defendants found unacceptable.

In the light of the evidence and the correspondence I do not find that Mr. Gros' words or conduct amounted to a waiver of these breaches of Clause V of the loan agreements. In accordance with that clause the plaintiff was thereafter entitled to serve demand notices for immediate repayment of the outstanding principal and interest. That was done on 5 November 1990.

On that day five demand notices were served on the second defendant. They were each addressed to the first defendant. It is only in relation to the first loan agreement that this now appears to be incorrect. It is my view however that as the second defendant knew at this time that the first loan agreement was between him and the plaintiff rather than the first defendant and the plaintiff as the loan agreement said on its face, he (the second defendant) cannot now say that he has not been served with a demand notice. Had the plaintiff had the same knowledge as the second defendant at this time the position would have been different, although if



they had had such knowledge no doubt the demand notice would have been differently addressed.

Having dealt with all the relevant issues raised in the course of this trial I now hereby make the following orders:

That the second defendant pay to the plaintiff the sum of 40,082,484 XPF., and interest thereon at 16.9 per centum per annum from 24 October 1990 until the date of payment.

That the first defendant pay to the plaintiff the sum of 5,607,225 XPF., and interest thereon at 18.2 per centum per annum from 24 October 1990 until the date of payment.

That the first defendant pay to the plaintiff the sum of 5,373,325 XPF., and interest thereon at 16.9 per centum per annum from 24 October 1990 until the date of payment.

That the first defendant pay to the plaintiff the sum of 3,577,130 XPF., and interest thereon at 16.9 per centum per annum from 24 October 1990 until the date of payment.

That the first defendant pay to the plaintiff the sum of 6,068,029 XPF., and interest thereon at 16.9 per centum per annum from 24 October 1990 until the date of payment.

The court further orders that until such time as the defendants are in a position to make proposals to this court in respect of payment of the above amounts that there shall be no disposal of assets of both the first and second defendants without the express consent of the plaintiff or by further order of this court.

The plaintiif's costs shall be paid by the first and second defendants in equal parts, such costs to be agreed or taxed.

Dated this 9th day of June 1992

Judge of the Supreme Court