

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

Civil Case No. 213 of 2007

**BETWEEN: WESTPAC BANKING CORPORATION**  
Claimant

**AND: JEAN MARCEL GOISET and THI TAM GOISET**  
First Defendants

**AND: TERRENCE and PHILIPPA HANNAM**  
Second Defendants

**AND: SAM MAHIT**  
Interested Party

**Coram:** *Justice N. R Dawson*

**Counsels:** *Mr. Mark Hurley and Mr. Kalmet for the Claimant  
First Defendants – no appearance  
Mr. Juris Ozols for the Second Defendants  
Mr. Willie Daniel for the Interested Party*

**Date of Hearing:** *16 September 2009 and 14 October 2009*

**Date of Decision:** *23 October 2009*

## **JUDGMENT**

1. This hearing was held to hear the Application of the Second Defendants, that the Claimant be restrained from seeking to claim possession of the premises occupied by the Second Defendants known as Cyber Café a fish and chip business, and such further orders as the Court deems fit.
2. The substantive hearing took place on 16 September 2009 and at the end of that hearing the Court required the Claimant to provide certain documentation to the Second Defendants with any further applications arising from such disclosure to be filed and served by 8 October 2009. On 14 October 2009 it was confirmed by counsel for the Second Defendants that the disclosure had been made and that no further applications were



forthcoming and it was agreed that it is now in order for the Court to issue a decision with respect to this Application.

3. The background to this Application is that a complex of shops known as Cyber Village owned by Mr. and Mrs. Goiset is mortgaged to the Westpac Banking Corporation. Due to non-payment of amounts owed to Westpac, it has obtained orders to sell this property, along with other properties owned by the First Defendants.
4. The Second Defendants occupy the Cyber Café, one of the shops in the Cyber Village building, pursuant to a lease with First Defendants. This lease was signed on 3 February 2009, and the lease commenced on 1<sup>st</sup> March 2009. The term of the lease is for 3 years with two further rights of renewal of 3 years each. The lease was not registered, a requirement under section 22 of the Land Leases Act [CAP. 163]. Section 22 says:-

*22. (1) No registered lease or mortgage shall be capable of being created or disposed of except in accordance with this Act. Every attempt to create or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect, any right or interest in a registered lease or mortgage otherwise than in accordance with this Act shall be ineffectual to create, or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect any right or interest in the lease or mortgage.*

*(2) Subject to the provisions of subsection (3) every instrument creating or disposing of a registered lease or mortgage shall be registered.*

*(3) It shall not be necessary to register-*

*(a) any lease for a period not exceeding 3 years unless it is required to be registered under section 35; .....*

Section 35 clarifies that registration of a lease is required when the term of the lease exceeds 3 years and that the length of the term includes any

option for renewal. The total term of the lease, including the rights of renewal, exceeded three years and is therefore ineffectual against the Claimant's interests.

5. No formal consent of the Claimant as mortgagee was obtained pursuant to paragraph 3.11 of the mortgage, which says:-

*"Mortgagor's Powers of Subleasing*

*3.11 That with respect to the mortgaged land the Mortgagor will not without the written consent of the Mortgagee exercise any power of sub-leasing or granting a tenancy whether conferred by any Act the general law or otherwise or grant or agree to grant any sub-lease or accept the surrender of any sub-lease or assign transfer or part with possession or grant any tenancy or licence AND any omission by the Mortgagor to disclose to the Mortgagee by notice in writing prior to the date of this Mortgage the existence of any right or interest relating to the mortgaged land created or agreed to be created by the Mortgagor prior to the date hereof will constitute default hereunder."*

6. In addition section 56 of the Land Leases Act states:-

*56. (1) There shall be implied in every mortgage unless the contrary is expressed therein, on the part of the mortgagor, the following obligations-*

*(a) .....*;

*(b) .....*;

*(c) not, by any disposition, to subdivide or dispose the leased land or any part thereof or any interest comprised therein without the previous written consent of the mortgagee but such consent shall not be unreasonably withheld.*

7. Mr. Hannam said in his evidence that he saw the advertisement by Westpac Banking Corporation for the sale of properties belonging to the First Defendants in December 2008. That advertisement is headed up as follows:-



*"Westpac  
Mortgage sale  
Westpac Banking Corporation v. Jean Marcel Goiset and Thi Tam Goiset  
Supreme Court Civil Case No. 213 of 2007"*

8. Further down in the advertisement, it notes the fourth property tendered for sale as follows:-

*"Formerly 3 residential buildings. Now 1 commercial building known as 'Cyber Village' premises including shops."*

9. Mr. Hannam says that he is a long standing customer of Westpac and as a result of seeing that advertisement he spoke to Wendy Maan, an employee of Westpac who referred him to Mariana May-James, Manager Credit Risk at Westpac, who he says told him that Westpac was selling the La Pizzeria building and not the Cyber Village property. He has no record of that conversation other than his memory. The conversation with Ms. May-James took place late in January 2009. As a result of that conversation he says that he and his wife then commenced negotiations with the First Defendant for the lease of the Cyber Café which was signed on 3<sup>rd</sup> February 2009.
10. Mr. Hannam said in evidence that at about the same time he was re-negotiating his loans with Westpac and increased his loan facilities from VT15 million to VT18 million in order to accommodate the purchase of the lease of Cyber Café and the setting up of that business. Mr. Hannam accepts that the loan documentation entered into in late April, 2009 in the name of Hawaiian and South Pacific Limited, a company owned by him made no reference to the Cyber Café but he says that Westpac should or would have known that the increase in his borrowing was for that purpose.
11. Mrs. Hannam in her evidence produced a copy of an email from her to Daniel Cataki at Westpac saying *"I am wanting to know about the Cyber*

*Café land for sale, can you please put the person in charge of this matter to phone myself or Terry.*" She accepts she did not get a response to that email. In her evidence she said that before entering into the lease with Mr. and Mrs. Goisets she went to the Lands Office to check the title and confirmed that the Goisets were the owners of the property. She did not do a search of the mortgage register to find out whether or not the Claimant was a mortgagee of Mr. and Mrs. Goiset. She also recalls the conversation that Mr. Hannam had on the telephone with Wendy Maan and Mariana May-James but accepts that she could not hear what they were saying to her husband.

12. In her evidence Ms. Mariana May-James recalled having a conversation with Mr. Hannam and that the conversation took place some time after the advertisements for the sale of the Goiset properties were published in December, 2008. To the best to her recollection Mr. Hannam's enquiry was the effect of whether the Cyber Village property was for sale. To the best of her recollection she responded with a reply to the effect that the bank was not in a position to proceed with a sale of that property at that time given pending proceedings. The pending proceedings that she referred to was the Application for Stay/Suspension of the Court Orders at that time before the Court. She denied at any stage referring to the La Pizzeria building and says that Mr. Hannam did not ask her about the possibility of entering into a lease of a shop at Cyber Village. She recalled Mr. Hannam contacting her again in April 2009 to allege that she advised them that the Cyber Café property was not part of the Claimant's mortgagee sale and she denied that she ever had such a conversation with Mr. Hannam. She also said in evidence that there was never any confusion as far as Westpac was concerned as to which property (ie. Cyber Village or La Pizzeria) that was for sale and that Westpac was never selling La Pizzeria.
13. Daniel Cataki, another employee of Westpac, in evidence confirmed that he had a conversation with Mr. Hannam towards end of January 2009 and

said he was positive that he has not made any mention of La Pizzeria premises being for sale.

14. Mr. Glen Craig, the Manager of First National Real Estate, gave evidence that the first time he had any discussion with Mr. Hannam concerning the sale of the Cyber Village premises was on 22 May 2009. He was able to confirm that date by checking his cheque book with reference to a cheque he paid to Mr. Hannam that same day regarding water rates. He confirmed that he said to Mr. Hannam words to the effect that "*In the early days Westpac thought it was the Pizzeria and not Cyber Village. Subsequent investigation revealed that in fact Cyber Village was one of the properties and not Pizzeria as many local people thought was the case.*" He denied saying that it was his understanding that sale included the La Pizzeria building and that it did not include the Cyber Village complex. He said that serious discussions with Westpac about him being appointed the agent for sale of Cyber Village took place in the first week of February 2009 and it was after that date that he obtained the agency for the sale.
15. An email from Mr. Craig to Ms. May-James at 12:12 p.m. on 15<sup>th</sup> February, 2009 requested clarification from Westpac whether it was "*Cyber Village*" or "*Le Pizzeria*" actually for sale. At 12:29 p.m. the same day, Ms. May-James replied confirming that it was "*definitely the Cyber Café building*" for sale. She also indicated that she had "*checked with Land Records Office.*" That would indicate that Westpac already had on file Land Records Office searches for Cyber Village as she would not have had time to conduct a search at the Land Office in the 17 minute time lapse between emails. It also indicates that any confusion about which property was for sale was in the mind of Mr. Craig and not of Westpac's making.
16. The Second Defendants have the onus of proving their case and need to persuade the Court that on the balance of probabilities, that is to say, that it is more likely than not, that Mr. Hannam's recollections of the conversations with the Westpac officers is correct, that he was given an

assurance that it was in order for he and his wife to lease the Cyber Café shop in the Cyber Village complex, and that Westpac consented to that arrangement. In his evidence, Mr. Hannam accepted that he had been "pretty casual" when with his background as an experienced business man, having seen the advertisement that referred explicitly to the sale of the Cyber Village complex that he would then in reliance upon an unrecorded conversation with a bank employee go ahead and purchase the business of the Cyber Café and sign a lease for that shop with the First Defendants, when common sense would have indicated to him that the First Defendant might well be in serious financial difficulties. The Second Defendants did not have their lease with the First Defendants registered nor was the lease submitted to the Claimant for their formal consent. The Second Defendants could well argue that it was the obligation of the First Defendants to obtain their mortgagee's consent but then their claim would be against the First Defendants, not the Claimant.


17. The Second Defendants have simply failed to persuade the Court on the balance of probabilities that they received the explicit assurances from the Claimant they say they received. Even if the officers of Westpac had said anything to the effect that it would be in order for the Second Defendants to enter into a lease with the First Defendants for the Cyber Café, that in itself could not be construed as a formal consent to the lease. At best it could only be a suggestion to the Second Defendants that they enter into negotiations with the First Defendants but it could never be considered consent to a lease of which the bank had no knowledge as to its term, rental, or any other condition in that lease.
18. The submission that Second Defendant's lease is good for at least three years and nothing more, due to Section 22 of the Land Leases Act is not persuasive. Section 22, renders the whole of the lease ineffectual, not just the period exceeding 3 years. Even if that submission was the case, the Second Defendant's lease has still not been consented to by Westpac. Although a lease with a term of up to 3 years would not require registration

pursuant to section 22, for a lease to be valid against the Claimant, it must have had the consent of the Claimant, regardless of the term of the lease. The other submission by the Second Defendants that they be entitled to remain in possession of the Cyber Café premises until settlement of the sale of the Cyber Village complex by Westpac as mortgagee must also be rejected. It is opposed by Westpac as they say they want to go to the market place with vacant possession of the Cyber Village complex. Westpac is entitled to make that choice. It is well established law that a mortgagee exercising a power of sale is entitled to opt to sell with vacant possession. This is encapsulated in Maher v. Commonwealth Bank of Australia [2004] FCA 248, at page 10 "the mortgagee may recover in ejection, without giving notice to quit, against a tenant who claims under a lease from the mortgagor granted after the mortgage and without the consent of the mortgagee" It then goes on to say "The reason is obvious. A tenant to the mortgagor whose tenancy does not predate the mortgage cannot be in a better position than the mortgagor himself."

19. The Application by the Second Defendants to restrain the Claimant from claiming vacant possession of the Cyber Café premises is therefore declined.
20. Costs are payable by the Second Defendants to the Claimant on a standard basis at an amount to be agreed by the parties or failing agreement as taxed by the Court.

**DATED at Port Vila, this 23<sup>rd</sup> day of October, 2009.**

**BY THE COURT**

  
**N. R. DAWSON**  
Judge.

