

BETWEEN: PASCAL TAVAL
Claimant

AND: JEAN MICHEL MALEB
First Defendant

AND: MARCELLIN MALEB
Second Defendant

AND: SANITA(sic) LENDING SCHEME
Third Defendant

Hearing: 22 August 2014 and 16 February 2015

Submissions: 17 February 2015

Judgment: 9 March 2015

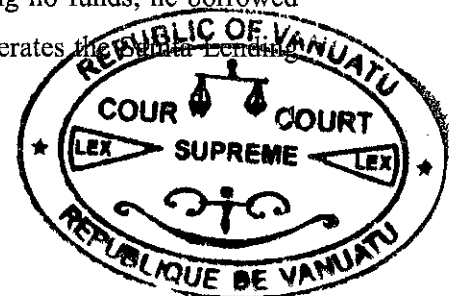
Before: Justice S M Harrop

Counsel: Eric Molbaleh for the Claimant
Less John Napuati for the Defendants

RESERVED JUDGMENT

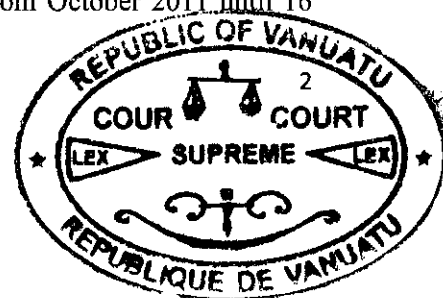
Introduction

1. Pascal Taval is a teacher on Santo and owns a property at Bladiniere Estate in Port Vila. He purchased that land and built four apartments on it in 2009 having borrowed VT8,000,000 from Bred Bank (Vanuatu) Limited for the purpose. The units were rented out to tenants from August 2009.
2. In July 2011 Mr Taval decided to sell the property and advertised it on the internet. A person in England expressed interest in buying it but in what appears to have been a blatant scam that person first wanted Mr Taval to send him VT800,000 so that he could arrange for release for funds to allow him to purchase the property. Naively Mr Taval agreed to remit the VT800,000 to England but, having no funds, he borrowed VT785,727 from Jean Michel Maleb ("Mr Maleb") who operates the ~~Summa Lending~~ ^{Summa Lending}



Scheme. The agreement was that he would repay the loan within a week once he received the purchase price from England. Unsurprisingly no money arrived from England.

3. A further arrangement was reached with Mr Maleb for Mr Taval to repay what had been borrowed together with interest. Mr Taval says that he also offered to pay a further VT200,000 to recognise the inconvenience he had caused Mr Maleb by not repaying within the week.
4. Because Mr Taval had no available cash, his teacher's salary being consumed with repayments to Bred Bank and living expenses, he agreed to allow Mr Maleb to collect the rental income from the tenants at the Bladiniere Estate apartments in reduction of the debt.
5. In this proceeding Mr Taval claims that in that way he has more than repaid what he owes Mr Maleb and he seeks judgment for the "total of extra monthly rents the defendants collected from the tenants between October 2011 until the determination of this matter". No precise sum is claimed.
6. Mr Taval says the agreement was that he would pay 10% per annum simple interest with an appropriate proportion of that being paid each pay day. On this basis he says the total amount to be repaid was VT1,064,299 including all the interest and the extra VT200,000 which he had offered Mr Maleb.
7. Mr Maleb ought to be the only defendant in the proceeding; the second defendant Marcellin Maleb was included (erroneously) because he, being resident in Port Vila, was asked by his older brother Jean Michel to manage the recovery of the rent from the tenants. The third defendant, Santa Lending Scheme does not appear to be a legal entity capable of suing or being sued: it is a business operated by Mr Maleb.
8. Mr Maleb says that the agreement as to interest was that 10% interest would be charged *per pay day* so that the annual interest was approximately 260% , not 10% as Mr Taval says it was. He denies there was ever any agreement about a VT200,000 top up. He says the amount received from the rental properties, after deducting appropriate expenses, has amounted only to VT733,000 from October 2011 until 16



February 2015. Accordingly Mr Maleb says that, not even the principal borrowed(which he says was VT877,582, not VT785,727)) has been repaid, never mind any of the substantial interest. He says the amount owing by Mr Taval is in excess of VT5,000,000 and therefore denies that he has received any overpayment of the loan – on the contrary he has been substantially shortpaid.

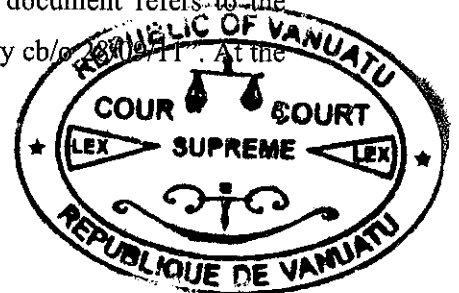
9. Although in his statement of defence filed on 25 February 2014 Mr Maleb said he would file a counterclaim for some VT5,000,000, he has not done so.

Issue

10. The fundamental issue I therefore have to decide is whether Mr Taval has paid back more than he was required to under the agreement between the parties, or not. If he has overpaid Mr Maleb then in principle he will be entitled to judgment (as to liability); if he has not, then he will not be entitled to judgment.
11. If Mr Taval is entitled to a judgment, consideration then needs to be given to whether he has proved on the balance of probabilities exactly *how much* that judgment should be for.
12. If successful, Mr Taval also claims VT3,000,000 for general damages, VT500,000 for punitive damages, interest and costs.

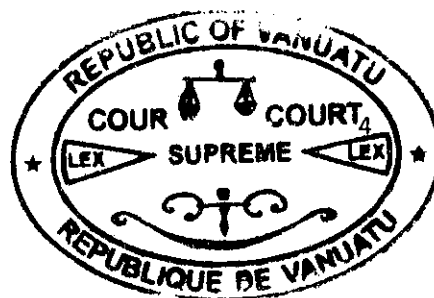
The history according to Mr Taval

13. Mr Taval says he borrowed a total amount of VT785,727 on 27 September 2011 (his claim refers to July but it was clarified in evidence that the loan was taken out on 27 September). He says two sums were advanced to him that day by Mr Maleb, a smaller amount in the morning and a larger one in the afternoon. The total however, he says, was VT785,727. These transactions took place at Mr Maleb's home on Santo.
14. Mr Taval says that he signed only one "receipt", although this is a curious document because it purports to record that *Mr Maleb* had received the sum of money from Mr Taval whereas of course it was the other way round. The document refers to the Vt785,727 advance then states "10% int per pay day 1 pay day cb/". At the



bottom of the simple document, which is on a standard printed form of receipt, there is the total of VT942,872 and both Mr Maleb and Mr Taval have signed it. Mr Taval says these references to “per pay day” make no sense because the arrangement was that he would repay the money within a week. It was not intended to be an arrangement which extended into the future. It did not contemplate instalment payments on his fortnightly pay days.

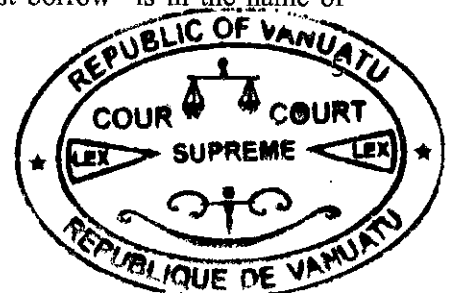
15. After the purchaser in England did not send the promised purchase money, Mr Taval went back to Mr Maleb and offered him a total of VT1,080,662 as set out in a letter which is curiously also dated 27 September. He says that this sum was meant to indicate the principal borrowed plus the 10% interest plus the VT200,000 for messing Mr Maleb around.
16. Another letter of the same date records agreement that Mr Maleb may collect money in reduction of the amount outstanding from the tenants renting the apartments at Bladiniere Estate. This letter is in standard typed form, addressed to Santa Lending Scheme and begins: “Ref: Loan Agreement Assets”. There is a handwritten addition referring to the rental income from the apartments at Port Vila.
17. Mr Taval says that Mr Maleb arranged for his younger brother Marcellin to collect the rent. Because he understood there were four tenants, each paying VT25,000 per month the income being applied in reduction of the debt would be VT100,000 per month.
18. Mr Taval accepted when giving evidence that because he was on Santo and Marcellin Maleb was in Port Vila he had agreed that he could manage the tenancies. This included, at least in some respects, meeting out of rental income some related expenses. He denies however agreeing that Marcellin Maleb should receive a monthly allowance for his management services. He also disputes authorising various other deductions which have subsequently become apparent from the document prepared by Marcellin Maleb purporting to set out the income and the expenditure between October 2011 and January 2014; no details have been provided for the period since this proceeding began in early February 2014.



19. Mr Taval also complains about the repeated failure of Mr Maleb to provide him with details and supporting documentation relating to the rental collected and an updated position as to repayment of his loan.
20. Overall, Mr Taval contends that on the basis that VT100,000 per month has been paid between October 2011 and December 2013 Mr Maleb will have received some VT2,600,000. Given that the agreement required him only to repay Mr Maleb VT1,064,299, he says Mr Maleb, as at December 2013, has “stolen” some VT1,535,701 from him. This he says has caused him continuing difficulty in having to meet his loan repayments to Bred Bank with his own salary rather than using the rent collected from the tenants of the property to which the bank loan relates.

The history according to Mr Maleb

21. Mr Maleb has operated the Santo Lending Scheme since approximately 2000. He says that when Mr Taval approached him to borrow the money, he was reluctant to lend such a large sum but was persuaded by his wife to do so. He says that before lending Mr Taval the money he explained to him his Scheme’s policy, including the 10% per pay day interest rate. He has annexed to his first sworn statement a copy of this policy. Mrs Maleb said that at the time the loan was taken out Mr Taval spent approximately one hour with her and her husband, that he was given a copy of the policy to read and although a copy was not given to him to take away, it was fully explained by her husband. Mr Taval however denies there was any reference to or discussion about the policy and in particular denies being told about the interest rate being charged on per pay day basis. He says he did not see the policy until it was annexed to one of Mr Maleb’s sworn statements.
22. Mr Maleb says that the arrangement to which Mr Taval agreed was that he was to be paying 10% interest per pay day and this was to be paid every fortnight when he received his government pay as a teacher.
23. Mr Maleb says there were two borrowings, one for VT91,855 on 23 September 2011 and further one for VT785,727 on 27 September 2011, so a total of VT877,582. Mr Taval accepts the “second borrow” occurred but denies that there was the earlier one for VT91,855. Although the receipt relating to “the first borrow” is in the name of

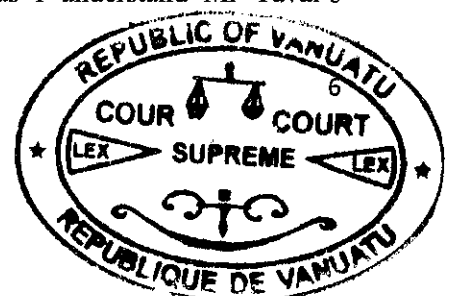


Pascal Tabang, I accept this is a simple error and that the signature appears identical to that of Mr Taval on the receipt relating to “the second borrow”. Mr Maleb points out that both receipts which signed by Mr Taval clearly stated “10% interest per pay day”. The existence of two signed documents supports Mr Maleb’s version that there were two “borrows”.

24. Mr Maleb goes on to mention the agreement that Mr Taval made in writing that in the event of default he would be able to seize assets such as land and vehicles including the rent from the Port Vila apartments.
25. Mr Maleb says that leaving aside income from the rental properties, the amount owing as at 18 November 2013 was VT5,879,731. He has provided a handwritten calculation of how this sum is reached, based on the obligation to pay interest of VT87,757 each pay day. Of the total which Mr Maleb says was owing as at 18 November 2013 , VT5,002,149 is interest.
26. Mr Maleb says that because he lives on Santo and his brother Marcellin lives in Port Vila, he arranged for Marcellin to manage the properties. It was necessary for him to spend a good deal of time there maintaining the units and making various payments on behalf of the tenants. As a result, although no updated calculation has been provided by Mr Maleb, he concedes through counsel that (only) the net sum of VT733,000 has been paid by Mr Taval in reduction of his debt. In Mr Maleb’s view the amount currently owing is well in excess of VT5,000,000 and it is increasing with every pay day given that the interest charge is greater than the net rental income.
27. In summary, Mr Maleb says that Mr Taval has not overpaid the loan debt but rather still owes a very substantial sum.

The fundamental dispute

28. The fundamental dispute between the parties, among various others (including whether there were one or two advances), is what was agreed about the interest. Was it to be paid at 10% per annum with an appropriate portion of that being added each pay day, or was 10% of the principal (i.e. according to Mr Maleb, VT87,757) to be added each fortnight i.e. on each pay day? Indeed, as I understand Mr Taval’s

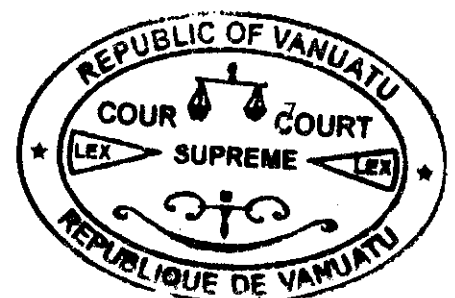


evidence, even the former possibility is not correct as he appeared to say the 10% interest was to be added *only once* and that the debt would not have any more interest applied regardless of how long it took to repay. He says the total amount he has to pay is Vt1,064,299 (which includes the Vt200,000 for messing Mr Maleb around, though the arithmetic is not quite right) and that figure will not increase. If correct, that would be commercially untenable from any lender's perspective.

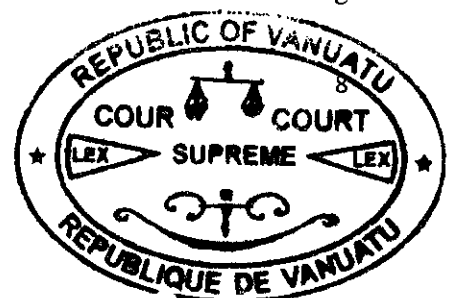
29. But even accepting the first option as being realistic from Mr Taval's perspective, self-evidently the financial difference between these two possibilities is dramatic. By my calculation it is the difference between 10% and 260% simple interest per annum.

Resolution of the claim

30. Although the dispute about interest is fundamental, in my view it is not necessary to resolve it in order to determine the outcome of the claim. That is because, even if I proceed on the basis of Mr Taval's interpretation (that he only has to pay Vt1,064,299) being correct, he has simply not provided sufficient evidence to establish that he has paid back more than that. The truth may well be that he has, but the court needs clear evidence to substantiate that.
31. Further, as claimant Mr Taval is required not only to establish an overpayment but also the exact amount of it. He has been unable to discharge either of these obligations.
32. Even if I were to accept that the amount he has to pay back is only Vt1,064,299 (and as I have observed, that surely cannot be right because even applying 10% simple annual interest would mean that the sum owed would increase by about Vt100,000 each year), there is no clear evidence that more than that has been repaid.
33. The first defendant acknowledges only that Vt733,000 has been repaid. It may well have been more but Mr Taval has not been able to prove it. This is, first, because the amount actually received in rental has been less, indeed much less, according to Marcellin Maleb, than VT100,000 per month even on a gross basis. The four units have not all been fully occupied during the relevant period.



34. Secondly, apparently with the approval of Mr Taval, at least some payments relating to tenancies, such as water and electricity payments have been paid from the rental income. He accepted that when he was the landlord between August 2009 and October 2011 he made certain payments of this kind on behalf of the tenants from their rental payments. So while there is undoubtedly a dispute by Mr Taval about whether any allowance by Mr Marcellin Maleb should have been deducted and about some of the other deductions he acknowledges were made, the final position is unclear.
35. On the evidence provided (and Mr Taval is entitled to rely on defence evidence, including Marcellin Maleb's schedule), it is impossible for the Court safely to conclude on the balance of probabilities that Mr Maleb has received more than Mr Taval agrees he had to repay. I reiterate that he may well in truth have received more, but Mr Taval has been unable to prove that he did.
36. In practical terms I note that Marcellin Maleb did provide a service which must have been of some value to Mr Taval and for which some sort of payment ought to be made. While there is a denial of any agreement as to this, Mr Taval, being resident at North Santo, was in no position to assist with the administration of the tenancies and maintenance of the units.
37. If Mr Taval had wanted to keep control of the rental payments, property-related expenditure and maintenance he could have done so and could simply have paid the net rental income from his bank account to that of Mr Maleb. But he agreed to have Mr Maleb, through his brother, manage the rental income and expenditure and the properties themselves. He therefore put himself in the position where he is dependent on Mr Maleb for an accounting of all rental received and expenditure incurred in relation to his apartments. In short, he depends on Mr Maleb to help him prove his claim against Mr Maleb.
38. I accept Mr Molbaleh's submission that there must be some form of trustee obligation on Mr Maleb to account for what has been received and spent but this is not, in itself, a claim against Mr Maleb for breach of any such obligation. Rather it is a simple civil claim alleging that Mr Maleb "stole" around Vt1,500,000 from Mr Taval. In making



that allegation Mr Taval has the obligation to prove it. It is not sufficient to point, as Mr Molbaleh did, to the *opportunity* for Mr Maleb to have obtained more than he discloses that he has received.

39. There are, in Part 8 of the Civil Procedure Rules, interlocutory processes (disclosure and administration of written questions) through which a claimant who is not in possession of all the information he needs to prove his claim may extract it from those who have it. But Mr Taval has not employed them.

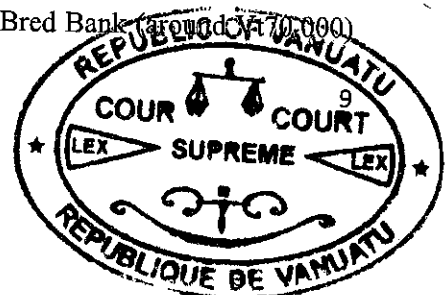
40. Both for want of proof of overpayment, and because of uncertainty as to exactly how much may have been overpaid, the claim must be and is dismissed.

Further Observations on the Issues

41. While it is not necessary to my decision, having heard all the evidence, I consider it appropriate, and I hope helpful to the parties, to make some comments on the other issues in dispute so as to assist them with deciding the way forward.

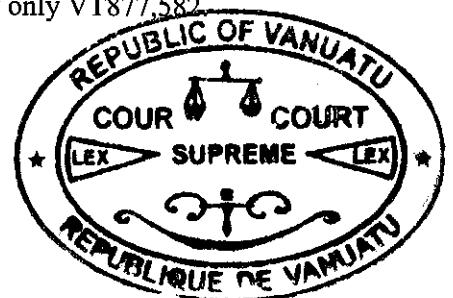
42. On the question of the dispute about when the interest accrued, I have come to the clear conclusion that Mr Taval would never have agreed to pay interest at 10% per pay day if the reality of that had been properly explained to him by Mr Maleb. I therefore do not accept the evidence of Mr Maleb and his wife that the policy of the Santa Lending Scheme was explained to Mr Taval. He was adamant that there was no explanation and that he did not see the document until Mr Maleb produced it in evidence. Given his financial position I cannot accept that he received an adequate explanation of what the Scheme required of him because had he done so he would surely have said that he could not afford to borrow from the Scheme on those terms. I therefore accept Mr Taval's evidence on this point and reject that of both Mr and Mrs Maleb.

43. Mr Maleb alleges that Mr Taval knowingly agreed to pay Vt175,514 per month in interest alone, when he was receiving a maximum possible income of Vt100,000 (and in fact much less) from the apartments. If that is so, every month the debt was *increasing by at least Vt75,500*, in fact by much more than that. Mr Taval needed his teacher's salary of around Vt100,000 per month to pay Bred Bank (around Vt70,000)

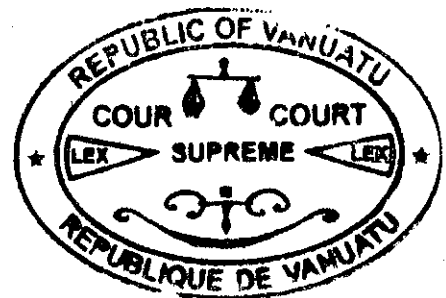


and to live on. Whatever his signature on the receipts may signify, it is inconceivable that Mr Taval knowingly agreed to pay interest on the Vt87,757 per pay day basis as Mr and Mrs Maleb claim he did.

44. I do accept that Mr Maleb has operated this Scheme for many years on exactly the basis that he says was agreed with Mr Taval, namely 10% interest per pay day. That is what the Scheme's policy says and that is the intention with which *he* went into the agreement. But I do not accept he properly informed Mr Taval of that and properly secured and documented his agreement to it.
45. I consider there was no true meeting of the minds between Mr Taval and Mr Maleb on the key issue of interest. Both parties appear genuinely to have thought their understanding about the term relating to interest was correct. It appears each was unaware that the other party thought differently. On the face of it then this is a case of mutual mistake.
46. If therefore there had been a counterclaim for the sum exceeding VT5,000,000 which Mr Maleb says is owing, I would have needed to explore the niceties of the law of mistake as applied to this situation and to determine whether the contract was void or merely voidable. However there is no counterclaim and there have accordingly been no pleadings or submissions about those legal issues, so I say no more.
47. I further observe that even if I had concluded that in truth the agreement was that there be 10% interest per pay day, I would have been very unlikely to uphold an argument from Mr Maleb that that provision should be enforced. That is because in my view the interest charge, amounting to 260% per annum, is usurious, exorbitant and unconscionable. Such a rate cannot possibly have reflected the reasonable cost (plus a reasonable profit return) to Mr Maleb of borrowing money to lend on to Mr Taval.
48. I note that the instalments required of Mr Taval by Bred Bank for its VT8,000,000 loan (at 9.9% per annum amount only to about VT35,000 per pay day- and they no doubt include a portion of principal repayment. By contrast Mr Maleb claims VT87,757 per pay day – for interest only- in respect of a loan of only VT877,582.



49. The court will not enforce an unconscionable contract, especially one reflecting inequality of bargaining power. It may be, as Mr Napuati pointed out, that Mr Taval is a reasonably well-educated teacher. However he is clearly naive and unworldly in commercial matters. This is evidenced first by his being easily “scammed” by the person from England, then arguably by his failure to ensure that Mr Maleb properly documented the loan agreement and finally by his allowing Mr Maleb, through his brother, to determine how much net income has been received from the rental properties and applied to the debt. Any commercially sensible person would have ensured that someone independent carried out that task, or would have done it himself, as Mr Taval did prior to the borrowing.
50. Mr Taval was in a desperate position when he found out he was the victim of the scam and unable to repay the loan within a week as he had expected and intended. That is the context in which he went back to Mr Maleb to reach a further agreement about how the initial advance (or two according to Mr Maleb) was to be repaid. Their bargaining positions at that point were far from equal.
51. In addition, as I observed to the parties at the hearing, this is yet another case which demonstrates the benefits of a properly-prepared loan contract and of independent legal advice being obtained by each party before signing. That may seem like an unnecessary cost at the outset, when no dispute is ever seriously contemplated, but experience shows that expenditure on legal advice at that stage may avert a great deal more later on. As the lender, Mr Maleb has to take responsibility for the poor and confusing state of the documentation relating to this loan; the *contra proferentem* maxim applies. He also has to bear the consequences of it if he later tries to enforce payment through the Court.
52. It is a matter for Mr Maleb whether in light of my observations he wishes to issue a proceeding seeking to recover the substantial sum he claims is owed by Mr Taval. I emphasise that I am not determining any such claim, because there is no counterclaim before the Court, but I respectfully urge Mr Maleb to take my comments into account in deciding the future of this matter.



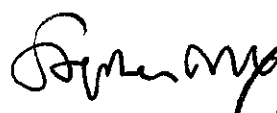
53. If Mr Maleb wishes to continue to manage the apartments owned by Mr Taval or if he wishes to advance a claim, then fresh proceedings will be required by one party or the other (or both) but for now I suggest it is high time a pragmatic solution was reached through which the parties disengage from each other. No doubt any resolution will require Mr Maleb to accept a much lower return on his Scheme's outlay than 260% annual interest. There remains plenty of scope for him to still receive a reasonable return. It may also require Mr Taval, whether strictly required or not, to make some further payment in order to extricate himself from his agreement that Mr Maleb manage his apartments to ensure repayment of the loan.

54. I strongly urge the parties to meet, together with their counsel, in an effort to put this unfortunate dispute behind them on a basis which is mutually tolerable, if not necessarily satisfactory, from the perspective of either side.

Result

55. The claim is dismissed. The defendants (effectively only the first defendant) are entitled to standard costs which are to be taxed if they cannot be agreed.

BY THE COURT


STEPHEN HARROP
Judge

