

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

Civil Case No.243 of 2011

BETWEEN: ANZ BANK (VANUATU) LIMITED
Claimant

AND: BELMONTE INVESTMENTS LIMITED
Defendant

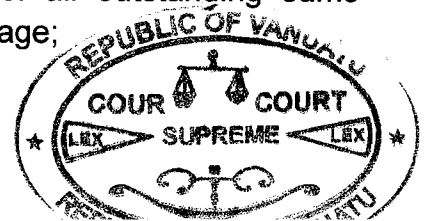
Coram: Justice D. V. Fatiaki

Counsel: Mr. M. Hurley for the claimant
Ms. C. Thyna for the Defendant

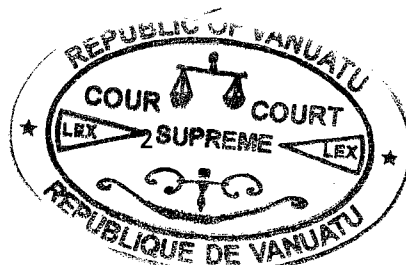
Date of Judgment: 17 April 2015.

JUDGMENT

1. This is an application for summary judgment supported by a sworn statement of an officer of the claimant bank ("ANZ") who deposes inter alia to her belief that there is no defence to the claim.
2. The chronology to the application may be summarised as follows:
 - 7 Sept. 2007 – ANZ advanced a sum of VT36 million to Gary and Jayne Bares of the defendant company ("*The Borrowers*") for the purchase of residential property. The loan was to be secured by a Third Party Mortgage taken over Leasehold Title No. 11/OY22/007 given by Belmonte Investments Limited ("*Belmonte*");
 - 4 April 2008 – Belmonte became the registered proprietor of Leasehold Title No. 11/OY22/007;
 - 18 Aug. 2008 – ANZ advanced an additional sum of VT37 million to the Borrowers secured by a variation of the Third Party Mortgage. The variation of mortgage was subsequently registered under the Companies Act [CAP. 191] in June 2011 and under the Land Leases Act [CAP. 163] on 8 September 2011;
 - 16 June 2011 – ANZ served a Demand Notice on the Borrowers and Belmonte requiring repayment of all outstanding sums secured by the Third Party Mortgage;



- 20 Dec. 2011 – ANZ issued the present proceedings seeking an order permitting it to exercise its mortgagee power to sell Lease Title No. 11/OY22/007;
 - 13 Jan. 2012 – Belmonte filed a response disputing the claim and indicating its desire to make a counterclaim;
 - 9 Feb. 2012 – Belmonte filed its defence denying liability and claiming damages for ANZ's "*unconscionable conduct*" and "*failure to act, in accordance with (the borrowers') instructions*";
 - 23 Feb. 2012 – Default judgment was entered (in error) against Belmonte;
3. Enforcement proceedings were then commenced and culminated in an application and renewal of an enforcement warrant.
- 23 Aug. 2012 – Belmonte filed an application to set aside the Default Judgment;
 - 12 Nov. 2012 – The Court of Appeal delivered its corrected judgment in Wilfred v. Westpac [2012] VUCA 31 in which the Court discussed the limitations of the Court's power under the Civil Procedure Rules in the granting of Default Judgments;
 - 11 Dec. 2012 – Default Judgment was set aside and the name of the defendant company was corrected;
 - 17 Dec. 2012 – Belmonte filed an Amended Defence;
 - 11 Jan. 2013 – ANZ filed the present application for summary judgment supported by a sworn statement deposed by its then Banger Asset Management;
 - 21 Jan. 2013 – Written submissions were ordered from the parties;
4. As of the date of this judgment the only submissions received was from the claimant. None has been provided by defence counsel who appeared on 21 January 2013 and despite an extension of time granted to defence counsel on 4 March 2013.

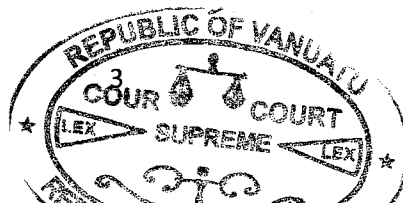


5. Be that as it may, counsel for ANZ submits in reliance on the judgment of Tuohy J. in NBV v. Tambe [2007] VUSC 105 that summary judgment is available on a claim seeking an order authorising the exercise of a mortgagee's power of sale. Reliance is also placed on the decision of the Court of Appeal in ANZ v. Lulum [2000] VUCA 7 where the Court of Appeal enumerated the 3 "pre-conditions" for the exercise of a mortgagee's power of sale as follows:

"that a default has occurred on the part of the mortgagor in meeting his repayment obligations under the mortgage agreement; that a NOTICE OF DEMAND has been served on the mortgagor requiring payment of the amount due under the mortgage, and finally, that the mortgagor has failed to comply with the notice in the time given".

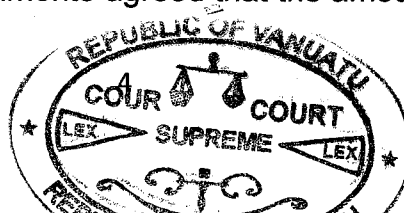
(my underlining)

6. Additionally, counsel submits that it is not a defence to a claim for a mortgagee power of sale order, to allege that the date inserted in the variation of mortgage was altered after execution where such alteration was for the purpose of making the variation registerable. Further, it is not a defence "to allege the overcharging of interest".
7. In the absence of written submissions, it is necessary to consider the defendant's Amended Defence and the sworn statement filed on behalf of the defendant company by its sole director **Gary Michael Bares**. From the amended defence the following "defences" may be extracted:
- (1) In September 2007 when the Third Party Mortgage was executed, the defendant company was not the registered proprietor of Lease Title No. 11/OY22/007 [**paras 3 (a) & 5 (c)**];
 - (2) "Upon its proper construction and in the events that happened, the Mortgage does not operate to secure payment to the claimant of any monies lent to the Bares "[**para 6 (e)**];
 - (3) "... there has been a total failure of consideration for the giving by the defendant of the Mortgage and the Mortgage is unenforceable against the defendant" [**para 7 (d)**];
 - (4) "... says that the Variation is of no legal effect and is unenforceable against the defendant" [**para. 12 (d)**];
 - (5) "... says that some person within the organisation of the claimant fraudulently and dishonestly completed or altered the variation so as to falsely represent that the same had been executed by the defendant and



had been signed by the Bares in 2011, specifically on 14 June 2011" [para. 13 (f)];

- (6) *"(if) ... the defendant was under any legally enforceable obligation to pay any monies to the claimant, the amount demanded in such Notice of Demand grossly exceeded the amount payable" [para. 19 (c)];*
- (7) *"... says that the claimant is not entitled to maintain these proceedings upon the faith of or in reliance upon the Notice of Demand dated 16 June 2011" [para. 20 (e)];*
8. Before dealing with the "defences" it may be noted that Belmonte admits *"that in September 2007 Gary Bares was a director"* and further, in September 2007, it executed a document entitled: *"Third Party Mortgage in respect of its lease Title No. 11/OY22/007 in favour of ANZ to secure advances made to Gary Michael Bares and Jayne Maree Bares ("the Bares") for the purchase and subsequent renovation of a residential property.*
9. In this latter regard by an offer letter dated 7 September 2007 ANZ agreed to lend **VT36 million** to the Bares, to purchase a residential investment property on the Lagoon in the Nambatri area (the *"first loan"*). The loan was *"repayable on demand"* and required by way of security, a third party mortgage to be given by Belmonte over its leasehold Title **No. 11/OY22/007**.
10. The Acceptance clause (at p. 5 of the offer letter) also provided: *"this offer shall be deemed to be an offer not only to the Customer but also to each Surety named herein. The customer and any surety shall be deemed to have accepted the offer severally upon execution by them of a copy of this letter and delivery of it to the bank"*. By an undated, signed, and sealed Surety Acknowledgement (at p. 8 of the offer letter) Belmonte acknowledges that its Third Party Mortgage secures *"all present and future obligations of (the Bares) to the Bank"* however enforcement of the security was limited according to the conditions of the mortgage.
11. By a subsequent Letter of Offer dated 18 August 2008 ANZ again agreed to advance a further **VT37 million** to the Bares for the purpose of renovating the residential investment property (the *"second loan"*). This loan too was *"repayable on demand"* and required the existing third party mortgage *"to be stamped to VUV73,000,000"*. This offer was accepted by the Bares on 19 August 2008.
12. By a Variation of the third party mortgage dated 14 June 2008 executed by Belmonte and the Bares, Belmonte agreed that the amount secured by the third party mortgage:

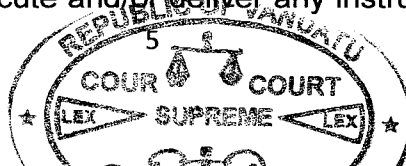


"... is increased from THIRTY SIX MILLION VATU to SEVENTY THREE MILLION VATU (VT73,000,000) being an increase of THIRTY SEVEN MILLION VATU (VT37,000,000)".

The Variation was registered on 8 September 2011.

13. For completeness by NOTICE OF DEMAND dated 16 June 2011 served on Belmonte and the Bares, ANZ demanded repayment within 7 days and 14 days (respectively), of the amounts outstanding and owing to the Bank namely **VT83,288,176**. The Notice recorded that monthly repayments were 37 months and 6 months outstanding in respect of the 2 loans taken by the Bares. It also identified the security held as a *"Third Party Mortgage over the leasehold property title No. 11/OY22/007 given by Belmonte Investments Limited"*.
14. Returning to the Third Party Mortgage and, for present purposes, given the nature of the *"defences"* raised, I refer to the following relevant terms and conditions:
 - **Clause 1.3:** Belmonte expressly agrees and declares that as between it and ANZ, it: *"shall be deemed to be a principal debtor in respect of the monies hereby secured"*;
 - **Clause 1.4:** constitutes the mortgage: *"a principal obligation"* which may be enforced against Belmonte without ANZ first being required to pursue the Bares;
 - **Clause 2.1:** Belmonte agreed to pay ANZ the moneys hereby secured by the due dates for payment thereof and in the absence of an agreed date, the money shall be payable *"on demand"*.
15. By **Clause 1.1:** the expression *"... monies hereby secured"* includes:

"all monies now or hereafter actually or contingently due, owing or payable to ANZ by Belmonte either alone or in conjunction with any other person on any account whatsoever and whether as principal or surety".
16. By **Clause 3.18:** Belmonte agreed at its own expense to do anything necessary to register or otherwise perfect the security and undertook to sign, seal, execute, and deliver to ANZ any deed, document, or writing reasonably required to perfect the security or the right, powers, and remedies of ANZ, and significantly, in **Clause 4.11:** Belmonte *"... irrevocably appoints ANZ and its duly authorised officers jointly and severally its attorney"* for all or any purposes with full power to sign execute and/or deliver any instrument deed or document

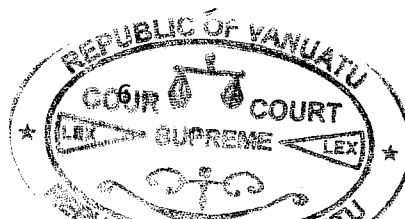


which may be required, and finally, Belmonte "*ratifies and confirms and agrees to ratify and confirm all and whatsoever ANZ does or causes to be done under or by virtue of this covenant*".

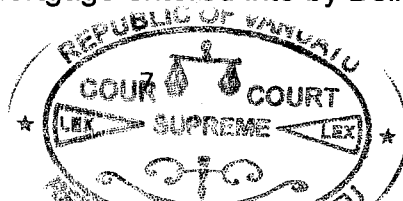
17. More particularly, in terms of **Clause 4.11 (b)**: in relation to a variation of the Third Party Mortgage, Belmonte authorised and empowered ANZ:

"to execute for and on behalf of Belmonte any such variation as required from time to time and to lodge any variation for assessment as to liability for any stamp duty, registration fee or other government charge or liability".

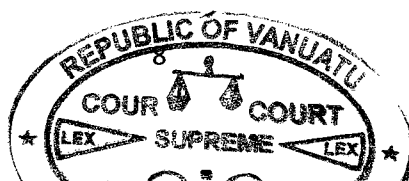
18. Finally, reference may be made to **Clause 5.7**: which provides that upon the occurrence of an event of default all moneys hereby secured shall immediately become due and Belmonte will repay the same upon demand.
19. Returning to the "*defences*" earlier enumerated. It is plain from the relevant transfer document that Lease Title No. 11/OY22/007 was transferred to Belmonte on 15 January 2008 and was subsequently registered in the Lands Registry Office on 4 April 2008 (ie: some 7 months after the third party mortgage had been executed by Belmonte). It is equally plain from ANZ's offer letter of 7 September 2007 that a Third Party Mortgage given by Belmonte over lease title No. 11/OY22/007 was to be the security for the loan. Furthermore by **Clause 3.21(b)(i)** of the Third Party Mortgage, Belmonte represented and warranted to ANZ that: "*the Lease is valid and subsisting at the date of the Mortgage*".
20. I accept that unless and until registered the Third Party Mortgage remains a valid and binding agreement between Belmonte and ANZ (see: Section 22(5) of the Land Leases Act). Furthermore, registration of a mortgage under the Land Leases Act makes it effective "*as a security only*" and enforceable by an application to the Court by the mortgagee to exercise its power of sale (see: Sections 51(3), 58 and 59 of the Act). Failure to register a mortgage however, does not render it invalid nor does it extinguish the nature of the mortgagee's equitable interest in the mortgaged land.
21. Does the registration of the transfer of the lease to Belmonte after the execution of the mortgage affect the validity of the mortgage?
22. A "*mortgage*" is defined in the Act as: "*an interest in a registered lease given as security for the payment of money ... and includes the instrument creating the mortgage*". I note as a matter of definition, that the "*interest*" created by a mortgage as opposed to the lease over which it is created need not be "*registered*".



23. Having said that a combined reading of the provisions of section 22 (2) read with sections 51 and 52(1) of the Act makes it clear that only a "*proprietor*" of a registered lease can create a mortgage over it and a mortgage is not "*completed*" until it is registered. In other words unless and until a mortgage is registered it gives rise to contractual obligations and equitable interests but is unenforceable as a security under sections 58 and 59 of the Act.
24. Plainly the execution date of the Third Party Mortgage although significant in creating contractual rights is, in my view, immaterial, in the context of the Land Leases Act which is based on registration. Accordingly I reject **defence (1)** as unarguable.
25. In this important regard, the Third Party Mortgage was only "*completed*" and became enforceable under the Act on 8 September 2011 which is 3 years after the registration of Belmonte as the proprietor of Leasehold Title No. 11/OY22/007 and 3 months before enforcement proceedings were filed in court albeit that the 2 loan agreements and mortgage variation had already long been executed.
26. The absence of registration however, does not necessarily leave a mortgagee unprotected as is clear from a reading of section 52 (3) and 57 of the Act and the Application for Restriction clause in the Third Party Mortgage. I am also unattracted to the proposition that a defendant should be allowed to benefit from its own wrong doing and misrepresentations.
27. As for **defences (2)** and **(3)**, given the defendant's admissions that ANZ had "*lent*" (past tense) monies to the Bares and its admissions that "*at some time in 2008, it executed a document entitled 'Variation of Terms of a Third Party Mortgage'*" which constitutes its consent to the up-stamping of the Third Party Mortgage to VT73 million, I am firmly of the view that neither defence is arguable.
28. My reading of the "*consideration clause*" in the First Schedule of the Third Party Mortgage is that it relates to monies already lent or advanced as well as monies that are lent or advanced after the execution of the Third Party Mortgage and the valuable "*consideration*" that passed from ANZ to Belmonte was its forbearance to demand immediate repayment of any monies lent or advanced by agreeing "... *to continue to make the moneys hereby secured available to the Mortgagee*".
29. As for **defences (4)** and **(5)** which relates to the Variation document. Specifically about the alteration of the date of execution from "2008" to "2011", I am satisfied that the date of the Variation is neither material, *nor* affects the validity of the Third Party Mortgage entered into by Belmonte and ANZ.



30. Indeed it would appear that the so-called alteration in the execution date was done to save the Bares from having to pay an additional fee for the delayed registration (see: Section 25) and paragraph 2 of the letter of 7 September 2007 (at top of p.2) which clearly states that all registration fees incurred or assessed in respect of the security documentation "... will be at the cost of the customer".
31. **Clause 4.11 (b)** clearly contemplates not only the lodgement for registration by the mortgagee, of a variation of the Third Party Mortgage where the monies lent exceeds the registered amount or where the mortgagee desires to properly secure any monies lent, but also the mortgagee is, specifically, authorised and empowered to execute for and on behalf of the mortgagor such variation as required from time to time.
32. Additionally, given the defendant's unconditional admission in **paragraph 15 (a)** "*That the Variation was stamped and registered on 8 September 2011*", I am satisfied that pursuant to section 15 of the Land Leases Act, ANZ acquired an indefeasible right or interest in the mortgaged land to the extent of the registered variation which was not liable to be defeated except as provided in the Land Leases Act. (see: generally in this regard the judgment in Paradise Constructors & Co. Pty Ltd. v. Pyozer [2007] VSCA 316 and Fisher v. Rural Adjustment and Finance Corporation of Western Australia [1995] FCA 1170).
33. Needless to say I do not accept that the defendant's bare assertion that the alteration was done "*fraudulently and dishonestly*" is sufficient to raise an arguable defence or undermine the bank's indefeasible interest.
34. Defences **(4)** and **(5)** are also rejected as unarguable.
35. I turn finally, to consider **defences (6)** and **(7)** dealing with the Notice of Demand which is directed at the amount demanded of "**VUV83,288,176**" and service of the Demand.
36. After carefully considering the sworn statement of Elizabeth David, Manager Asset Management of ANZ filed in support of the application for summary judgment and annexures "A" and "B" and the provisions of **Clause 4.21** of the Third Party Mortgage, I am satisfied that the Notice of Demand was properly served on Belmonte at its registered office at PKF House on 20 June 2011 and on the Bares in Melbourne, Victoria by letter "*received on July 8th, 2011*".
37. There are also the admissions of **Gary Michael Bares** in his sworn statement deposed at **paragraphs 8, 9** and **11** that he and his wife had sought and accepted 2 loans from ANZ in the amounts of VT36 million in September 2007 (**Acc. No. 1182057**) and VT37 million in August 2008 (**Acc. No. 1252833**).



38. Furthermore, in respect of **Acc. No. 1182057** he accepts that "... between 21 May 2008 and 2 November 2009 no monies were paid to reduce the outstanding balance in respect of this account" and, although he deposes in respect of **Acc. No. 1252833** that regular monthly payments were made "... until about April 2011 ... the outstanding amount was generally a little under or over VT37,000,000 and never over VT38,000,000". There is no clear assertion that repayments are up to date in respect of both loans.
39. Bearing in mind the contents of the Notice of Demand read with the provisions of **Clause 2.1**, I am satisfied that ANZ lent the Bares (and Belmonte) VT73 million and as at the expiration of the Notice of Demand, the Bares (and Belmonte) were and continued to be "*in default*" of their repayment obligations under their loan agreements and under the Third Party Mortgage.
40. In light of the foregoing I am satisfied in terms of **Rule 9.6 (7)** of the **Civil Procedure Rules**, that the defendant has no real prospect of defending the claim and there is no need for a trial.
41. Accordingly judgment is entered against the defendant in terms of reliefs 1, 2 and 3 of the claim and counsel is directed to file draft orders for the approval of the Court. The claimant is awarded costs to be taxed if not agreed.

DATED at Port Vila, this 17th day of April, 2015.

BY THE COURT



D. V. FATIAKI
Judge.

