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

Enforcement
Case No. 15/854 SC/ENFC

BETWEEN: **1. Oliver Wikeley**
2. Jenny De Vine
Applicants

AND: **Trustees International Limited**
ATF Billabong Trust
Respondent

Date: ***15th & 23rd February, 2016***
Delivered: ***9th March, 2016***
Before: ***The Master Cybelle Cenac-Maragh***
In Attendance: ***Oliver Wikeley for himself and representing the Second Applicant, Mark Hurley for the Respondent***

JUDGMENT

An Application for Enforcement Warrant with sworn statement in support was filed on the 25th June, 2015 by Ridgeway Blake Lawyers to enforce Consent Order issued by the Supreme Court on the 24th October, 2013 in the following terms:

1. **That the Claimant has possession of the said land and premises.**
2. **That these orders shall be stayed until 1st January, 2014.**
3. **The stay order at Order 3 hereinbefore may be extended by further order of this court in the event the First Defendant presents evidence of a Notice of Appeal filed and served by Jenny De Vine to appeal the Judgment and Orders of Justice Bender including the Judgment which Justice Bender made on the 30 August, 2013 in File No.: (P) MLC3048/2010.**
4. **Liberty is reserved to the parties to restore this matter on 48 hours notice.**
5. **Each party shall bear their own costs.**

In the sworn statement the deponent stated that the stay granted at paragraph 3 had expired, that the First-Applicant had sought no extensions and that a notice to quit was served on the First-Applicant on the 17th April, 2015 along with a letter of the 4th May, 2015 extending the period of the vacation to the 5th May, 2015. Service on the First-Applicant was proved and undisputed.

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX 1 REPUBLIQUE DE VANUATU

This matter came up on the 9th December, 2015 for hearing of the Enforcement Warrant filed on the 25th June, 2015 at which time counsel for the Applicants Mr. Silas Hakwa informed the court that there was a pending Application to stay proceedings filed in 2013. My order was that the stay would be heard prior to the Application for Enforcement Warrant.

Prior to the filing of the aforementioned Application for Enforcement Warrant the First-Applicant had filed an Application to stay paragraphs 1 & 2 of the Consent Order of the 24th October, 2013 on the 17th December, 2013 on the ground that the stay should be granted pending the lodging of the Appeal by the Second-Applicant in Application SOA68 of 2013 of Judgment MLC3048 of 2010.

First-Applicant's Submissions:

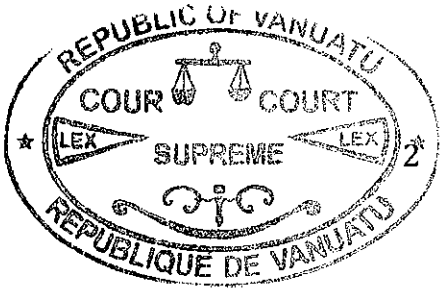
Together with his sworn statements of the 17th December, 2013, 9th December, 2015 and 15th February, 2016, Mr. Wikeley further submitted that the matters referred to in the sworn statement of Lisa Nato on behalf of ANZ Bank filed on the 8th February, 2016 were facts entirely new to him as regarded the claim filed against Mr. Slater in CC158 of 2015, and the subsequent Power of Attorney that was signed over to the Bank by the Respondent. These facts he said were material to financial documents his mother was required to prepare for her Appeal application. He went on to add that the signing of the Power of Attorney, one day after my order of the 9th December, 2015 was suspicious and showed Mr. Slater as a man who would prefer to allow trustees to sell the property and have his debts paid, with any monies recovered to his benefit.

He spent a considerable amount of time on the prejudice that would be suffered by his mother, the Second-Applicant, should the stay not be granted. That is, that she was already on welfare in Australia and likely to be destitute if the property in Vanuatu was sold. He was of the opinion that Mr. Slater's handling of his business affairs was not above board and together with his general neglect in making other payments it would make it difficult to recoup any monies from him.

Respondent's Submission:

Mr. Hurley stated that the real focus of this stay is the terms of paragraph 3 of the Consent Order of the 24th October, 2013 upon which the First-Applicant's Application is predicated. He went on to add that this order is now over 2 years old, and at no point in the First-Applicant's evidence was he able to show evidence of an Appeal filed by the Second-Applicant. He referred the court to paragraph 38 of the sworn statement of the First-Applicant of the 15th February, 2016 which states that an Appeal was to be filed that week.

Further, that the Second-Applicant has been declared a vexatious litigant before the Australian court and would therefore require leave to file any further proceedings at this point.



He addressed the question of prejudice raised by the First-Applicant by submitting, that due to the extent of the indebtedness to the Bank by Neil Slater there was unlikely to be any balance to be disbursed and that even if there was and the Second-Applicant was to overcome her difficulties and prove successful in an ultimate claim for the Captain Cook property, any balance would be held by the ANZ Bank to be distributed upon any final court order, or else, the balance placed with the court on trust.

Decision

I agree with the submission of Mr. Hurley that the focus of the stay application is limited to paragraph 3 of the Consent Order of the 24th October, 2013 which is very clear as to the event which would give rise to a further stay of the enforcement proceedings beyond the 1st January, 2014.

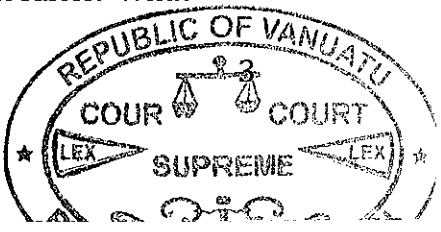
The entire slant of the First-Applicant's argument seems to tend towards the fact that Mr. Slater has wrongfully passed the property to the ANZ Bank to act as agents for the Respondent and that his mother is rightfully entitled to some part or the whole of the said property as her continued claims have asserted in Australia.

Notwithstanding, the First-Applicant caused a consent order to be signed in settlement of the claim CC117 of 2010 in which the Respondent/Claimant, Trustees International Limited ATF Billabong Trust sought vacant possession of the property, declaring the First-Applicant to be a trespasser. The effect of the consent order therefore is a tacit acceptance of the facts stated in the said claim.

Consent orders are somewhat peculiar, in that, depending on the circumstances, they can be treated by the court as contractual terms between the parties. If these terms are later to be avoided the court would treat those terms as it would any ordinary contract. Were this a usual order of the court, stemming out of its assessment of the merits of the case it could be amended or varied. Consent orders are unfortunately not appealable and therefore, Mr. Wikeley is bound to adhere to its terms, to which he was agreed, and must clearly show that an appeal from the Judgments and Orders of Justice Bender, more particularly the Judgment in MLC3048 of 2010 was filed in order to warrant any consideration of a stay.

I note further, that paragraph 3 did not provide for a mandatory stay of the proceedings on account of the use of the word "may be extended" which suggests that consideration would be given by the Respondent to extend, if the Second-Applicant was able to prove filing and service of the said Appeal.

I have not only read through in detail the plethora of documents filed by Mr. Wikeley but the court's own pointed question to him revealed that there was no filing of an Appeal, indicating that it was shortly to be filed. I am baffled as to why, after almost two (2) years, the Second-Applicant has been unable to lodge and serve the necessary Appeal, knowing the consequence, especially to the First-Applicant if this was not done by the deadline or thereafter. What the



Applicants have instead done is to detract from the non-filing of this pertinent Appeal and attempt to raise issues irrelevant to the matter at hand.

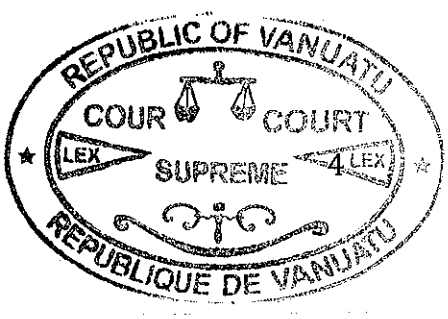
The First-Applicant had a second opportunity to produce these documents when the court submitted seven (7) questions to counsel for the Respondent and the First-Applicant to be specifically addressed and which was heard on the 23rd February, 2016. Both parties submitted their answers in writing. The First-Applicant was still unable at that point to produce any filed and served Appeal.

Further compounding the non-filing of the Appeal by the Second-Applicant is the hurdle to be overcome in her being declared a vexatious litigant before the Australian court. If the Second-Applicant has not yet filed this Appeal it would be extremely difficult for her to do this now as any further action by her in relation to Mr. Slater and the distribution of the properties requires the leave of the court. Having read the judgment of Bender declaring her a vexatious litigant I cannot see the court of Australia readily granting her leave to litigate the same or similar matters already adjudicated upon. Even if the Second-Applicant was to prove filing of an Appeal it could carry no weight with the court at this stage as it would have to be accompanied by an order of the court granting her permission to file.

Were I to consider staying the enforcement proceedings it would be necessary for me to consider where the greater prejudice lay, that is, would the Applicants suffer more by not staying the enforcement or would the Respondent suffer more by staying the proceedings. Mr. Wikeley eloquently presented his mother's state of affairs, albeit without evidence, and the likely destitution she would suffer in being homeless and being unable to recoup any monies from Mr. Slater if the property was sold.

In the balance, I see both parties as equally yoked in the matter of the prejudice that would be suffered by both. The Bank has obtained a judgment which it cannot execute as long as the First-Applicant remains in possession of the property, with the debt continuing to increase along with the Bank's liability. This of course has all manner of economic and business repercussions to the Bank.

The First-Applicant would obviously be homeless, though I am strained to accept that his mother would be, as it would appear that her usual place of residence is Australia where she lives with her youngest son Benedict on welfare. I presume that she must live in some accommodation as the First-Applicant has not asserted otherwise. The First-Applicant did use the word *"technically"* homeless, which would suggest that she would simply be without a home in Vanuatu and not Australia. As to whether the Second-Applicant would be able to recoup any monies from Mr. Slater if the property is sold is a moot point for the fact that the Bank has not only a judgment, but stands as agent under the said judgment and Power of Attorney to act for the Trust in selling the property to pay off the debt, a debt which far exceeds its value based on the statement produced by the Bank [Exhibit LN1, pgs. 19-31].



The Second-Applicant has produced insufficient evidence to satisfy this court that any losses due to the Second-Applicant by Mr. Slater could not be adequately compensated for monetarily. On the contrary, if there were losses suffered by the Bank on account of the First-Applicant's continued possession of the property, the Applicants admitted state of impecuniosity would mean a complete inability to compensate the Bank or Mr. Slater.

What Mr. Wikeley has failed to consider, is that even if his mother was to prove successful at every turn in the Australia court and the Captain Cook property awarded to her, she could go no further, other than in name to claim the said property for the following reasons:

1. Mr. Slater represented to the Bank that he had title over the property in order to obtain a loan facility. Following the grant he transferred the property into a trust with whom the Bank had no contractual relationship and therefore could not enforce their debt when it went into arrears as there was no property to enforce judgment against, the mortgage not being assigned to them. Consequently, an order amounting to specific performance of the contract between Mr. Slater and the Bank was made, which resulted in the trust rightly giving over its control of the property to the mortgagee to sell and pay off the debt of Mr. Slater. In considering an order for specific performance the court would have had to determine the bona fides of the mortgagee and whether it had acted rightly in all the circumstances. The grant of the said order suggests that the Bank was found to have acted rightly in all the circumstances; the court finding no fault with the Bank in its dealings with Mr. Slater.

2. The judgment gives the Bank a first charge against the property, over and above any other claim. This first charge would exist whether it had been by the registered mortgage or the registered judgment.

The Second-Applicant's claims therefore would be for any balance from the proceeds of the sale of the property, which the Bank has indicated would be held on trust pending the outcome of the Second-Applicant's claims in Australia. Any further claims in relation to the property would have to be brought against Mr. Slater personally if the Second-Applicant's claim is that Mr. Slater acted fraudulently in taking out a mortgage without the consent of the Second-Applicant. This is not the matter to be addressed before this court.

Mr Wikeley raised certain objections which I will deal with separately so that he is left in no doubt as to the voracity of the Respondent's position. His objections were as follows:

1. **The claim CC158 of 2015 by ANZ Bank against Slater, the facility letter of the 30th January, 2008 by the Bank to Slater and the mortgage obtained were never disclosed to him or his mother.**

   The First-Applicant fails to appreciate that ANZ Bank had no business relationship with the Second-Applicant, she not being a party to the loan

arrangement granted to Mr. Slater. With no contractual obligations binding her to ANZ Bank, the Bank was under no requirement to inform, include or serve her with any proceedings. The Bank's only responsibility was to ensure, on the face of it, that Mr. Slater was the proper and sole owner and therefore authorised to enter such an arrangement with them. Without evidence to the contrary the Bank would have no reason to delve any further.

2. **That the Power of Attorney of the 10th December, 2015 was not disclosed and was executed over a cloud of suspicion being done one day after the order of the court of the 10th December, 2015.**

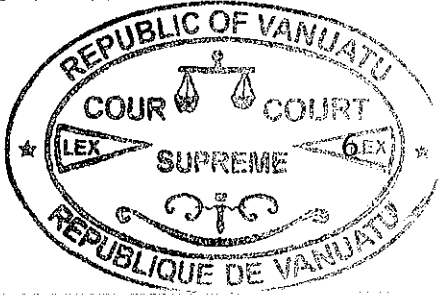
   There is nothing to suggest that the Power of Attorney executed on the 10th December, 2015 was done to thwart Mr. Wikeley's Application as he seems to suggest. It is clear that there was a claim [CC158 of 2015] which was undefended. The Bank was then free to enter a request for a default judgment which they would have undoubtedly received and then proceeded to enforcement, to seize and sell. In the alternative, Mr. Slater, by signing over the property for sale to the Bank, offered them no more than they were already entitled to. All he did was to make the process quicker and less expensive to all concerned; along with mitigating his losses, considering that interests would continue to accumulate against the debt. Had he not done so the Bank would have achieved the exact same outcome. As to whether the Power of Attorney is registered or not is immaterial at present until a sale is imminent, when the matter of registration would be necessary.

3. **That the granting of the Power of Attorney to ANZ amounted to economic abuse on the part of Mr. Slater.**

   This objection is established by the answer proffered at objection 2.

Having read through this file in its entirety, I can well appreciate, not only the effort expended by the Applicants in pursuing all avenues available, but the likely distress from their lack of success at every turn. The court cannot hope to understand the emotional strain and stress suffered by both Applicants but it unfortunately cannot be moved by emotion when the facts are very clear: the Second-Applicant agreed to relinquish possession to the Respondent but for the stay ending on 1st January, 2014 which could be extended upon proof of Appeal filed and served in MLC3048 of 2010. The Second-Applicant has been unable to so prove. Further, he is unable to surmount the charge by the Bank by virtue of the mortgage which they exercise over the property and the court can find no justifiable reason for withholding enforcement proceedings any longer.

Based on all that I have read and heard it would appear that the Second-Applicant's chances of success before the Australian court's seem slim and to continue to frustrate the Bank's legitimate judgment would amount to a miscarriage of justice.



My Order is as follows:

1. The Application for Stay of paragraphs 1 & 2 of the Consent Order of the 24th October, 2013 is dismissed.

2. The First-Applicant is to vacate the premises within thirty (30) days of the delivery of this judgment.

3. That the First-Applicant is not to diminish the value of the property in any way prior to his vacation or he could be liable in civil and/or criminal damage.

4. That the Respondent is to deliver Enforcement Warrant for signature of the court to seize and sell the property 11/OB31/11 also known as Captain Cook.

5. That following the sale of the property any balance after settlement of the debt is to be paid into court to be held on trust for whomsoever the Australian court may deem its beneficiary.

6. Parties are to bear their own costs of these proceedings.

DATED at Port Vila this 9th day of March, 2016.

BY THE COURT

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CYBELLE CENAC-MARAGH
MASTER

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU