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

Civil
Case No. 14/13 SC/CIVL

BETWEEN: JAMES ANDREW REILLY and JOHN TIMOTHY SWAN
Claimants

AND: MICHAEL THOMPSON
First Defendant
AND: AMANDA LAITHWAITE
Second Defendant
AND: MATANA INVESTMENTS LTD
Third Defendant

Civil
Case No. 14/198 SC/CIVL

BETWEEN: BRED VANUATU LIMITED
Claimant
AND: MATANA INVESTMENTS LIMITED
Defendant
AND: JAMES ANDREW REILLY AND JOHN TIMOTHY SWAN
Third Parties

Hearing: ***22nd May 2017***

Before: ***Chetwynd J***

Counsel: ***Mr Reilly in person***
Mr Finnigan & Mr Malcolm for the First and Third Defendants
Second Defendant unrepresented
BRED Vanuatu Ltd not appearing or represented

JUDGMENT

---

1. Civil Case 13 of 2014 involves a claim by Mr Reilly ("JAR") and Mr Swan ("JTS") against 3 defendants, Mr Thompson ("MT"), Ms Laithwaite ("AL") and a limited company Matana Investments Ltd ("Matana"). The Claim filed on 28th March 2014 was for breach

of contract and other ancillary causes of action and sought specific performance of the contract or, in the alternative, damages in excess of 4 million Australian dollars.

2. Civil Case 198 of 2014 was a mortgagee possession matter involving a bank ("Bred") as mortgagee, Matana as mortgagor and JAR and JTS as Third Parties.

3. By counterclaim in civil case 13 of 2014; and by way of a claim by Matana against JAR and JTS in civil case 198 of 2014; MT, AL and Matana seek damages. In support of restraining orders granted in 2014 by Aru J in case no.13 of 2014 JAR and JTS gave an undertaking as to damages. MT, AL and Matana are entitled to rely on that undertaking.

4. The brief background to both cases is that sometime in 2006 the limited liability company Matana was formed. MT and AL were the only directors and as such they controlled the company. Matana was the Registered Proprietor of land close to Port Vila. The idea was that the land would be developed as an apartment complex. In late 2006 there was a meeting between JAR, JTS, MT and AL. That meeting eventually led to a proposal being made whereby MT and AL would provide the land and JAR and JTS would cover the construction costs of the apartment complex. To begin with JAR and JTS were to fund the costs from their own pockets. The project began but sad to say the relationship between the parties broke down fairly early on and the breakdown led to legal proceedings. Civil Case 13 of 2014 was filed 23rd January 2014.

5. For reasons which can be explored later, in order to complete the construction of the apartment complex a loan was needed and one was arranged between Bred and Matana with personal guarantees being given by MT, AL, JAR and JTS. There was a default in payments and Bred commenced proceedings as Civil Case 198 of 2014 which was filed on 2nd June 2014. A judgment in those proceedings was handed down in favour of Bred on 1st September 2015 [1].

6. Pursuant to the judgment Bred took possession of the apartment complex and it was eventually sold. Following sale and in accordance with the judgment, Bred's lawyers wrote to the Chief Registrar of the Supreme Court with details of the net proceeds of sale. Two payments were made to the Chief Registrar's Trust Account of AUD 448,510.31 and VT 6,925,562. Those funds now fall to be distributed between the parties.

7. There is a third set of proceedings which should be mentioned but has no real relevance. Civil Case 1085 of 2016 is a claim by the liquidator of a company called Beachfront Development Ltd. The directors of that company were Mr Reilly and Mr Swan. The company was the subject of a winding up order in June 2015. The liquidator obtained a default judgment from Harrop J on 16th March 2016 against JAR and JTS for monies paid to the Company and used by JAR & JTS. An application to set aside the default judgment was refused on 16th May 2016.

8. As mentioned earlier the relationship between the parties, in particular Mr Reilly and Mr Thompson, started to deteriorate and there were attempts at separating the business interests of JAR and JTS on the one hand and MT and AL on the other. In November 2009 a document was produced which has been referred to as the Heads of Agreement. Mr Thompson does not accept that document as binding on him or that he

[1] *Bred (Vanuatu) Ltd v Matana Investments Ltd* [2015] VUSC 115; Civil Case 198 of 2014 (21 August 2015)

signed it. An agreement was drawn up supposedly in accordance with the Heads of Agreement but which, Mr Thompson says, contained terms unfavourable to him and Ms Laithwaite and which he refused to sign.

9. Despite that an agreement was reached sometime in June 2010. By then the construction of the complex was complete and so the parties agreed that units 1,2,3,4, 6 and 8 were for JAR and JTS to do with as they wished and units 5 and 7 would be for MT and AL. Ownership of the registered strata titles was still with Matana and that was still controlled by MT and AL. That was an accepted position in order to facilitate the eventual sale of the property. The parties had also agreed in early 2010 to convert the Vatu loan into an Australian dollar loan account. This was apparently a part of the proposed restructuring. In July 2010 all the parties in CC13 of 2014 signed a fourth loan agreement with Bred where the Australian Dollar loan was restructured into two facilities. Facility 1 consisted of 46.19% of the balance of AUD 1,045,774.50 and Facility 2 made up 53.81% of the balance. JAR, JTS, MT, AL and Matana were all jointly and severally liable for the whole but it was agreed that MT and AL would be responsible for Facility 1 and JAR and JTS for Facility 2.

10. Part of the agreement reached was that a body corporate would be formed which would manage the strata titles and the units. There is some dispute about the particulars of this element of the case. There is a sworn statement from Mr Reilly which says that a body corporate was set up in or about July 2010 [2]. The same sworn statement refers to the setting up of Pandanus Bay Waterfront Apartments Ltd in September 2010. There is reference in Mr Reilly's sworn statement to arrears of the body corporate fees. However what is not made clear by any of the parties is whether the body corporate is Pandanus Bay Apartments (a business name registered by Matana) or Pandanus Bay Waterfront Apartments Ltd. One is left with the distinct impression of confusion as to who was managing what. Mr Reilly (and presumably Mr Swan as well) complains about not being given information about Pandanus Bay Apartments and Mr Thompson complains about not being given information about Pandanus Bay Waterfront Apartments Ltd. Both sides refer to the lack of information about the body corporate.

11. From a reading of all the sworn statements, my understanding is that Pandanus Bay Apartments was a business set up to promote holiday lettings. It was basically a web based advertising and booking business. There is a suggestion in all the evidence that that business was handed over in 2010. The body corporate seems to be the new company, Pandanus Bay Waterfront Apartments Ltd. This understanding is based on the emails exhibited to various sworn statements from all parties and other such exhibits. For example there is a local newspaper article from the Vanuatu Daily Post published on 5th March 2011 where a Claudine Galibert Jones is quoted as saying she and her partner Mr Reilly were responsible for the body corporate. It seems on the face of it clear that the body cooperate was under the day to day control of JAR and JTS. Having said that there is other evidence to suggest there were two body corporates, one looking after units 1, 2, 3, 4, 6 and 8 and one in respect of units 5 and 7. How this would work is never really explained and just goes to indicate how far apart the factions were and how just a little communication could have resolved some issues. As it is the parties cannot even agree to disagree.

[2] See paragraph 33 of sworn statement of James Andrew Reilly originally dated 22/1/14, subsequently dated 24th February 2015 and filed on 23rd January 2014.

12. As a result of the apparent rancour of the parties the situation deteriorated even further. There was little agreement between the parties as to any marketing strategy and there were complaints about the lack of relevant information about lettings etc being supplied to real estate agents. In November 2013 MT began suggesting that the only resolution of the differences between the parties would be by way legal proceedings and that that was the path he was contemplating.

13. Around about the same time it appears that JAR took a different view. He said in his submissions to the Court, and I appreciate he was not legally represented at the hearing, that after five years of fighting and still having no rights to sell he decided to stop paying the mortgage. This was in order to "*make him do something*" meaning make MT do something. The result was action by Bred. Exhibited to various sworn statements is a series of Emails. The first one from Bred is dated 24th December 2013. It advises that a monthly payment is due. On 6th January 2014 there is another Email reminding of an overdue payment. Then on 9th January Bred write that the loan payment is 26 days overdue. Finally on 20th January 2014 Mr Hudson a Deputy General Manager with Bred Emails the parties advising, *"One of the Matana facilities is now past due 30 days with 2 repayments now in arrears..."* The email went on to warn that a legal notice of demand would issue which would require repayment of both facilities in 7 days. There is no dispute that the facility in arrears was Facility 2 attributed to JAR and JTS.

14. Several days after the Email from Mr Hudson JAR and JTS filed an urgent application for interlocutory orders pursuant to Rules 7.5 and 7.7 of the Civil Procedure Rules. The defendants were MT, AL and Matana. Thus Civil Case 13 of 2014 comes into being.

15. Nowhere in the urgent *ex parte* application or the certificate of urgency or indeed in the sworn statement in support by JAR dated 22nd January 2014 and filed the next day the 23rd January are the arrears mentioned or the threat by Bred to issue a legal notice of demand. In his sworn statement JAR dedicates 4 paragraphs to "Loan Financing" (paragraphs 10 to 13 inclusive) and 9 paragraphs (24 to 32 inclusive) on the "Loan Split". This despite the certain knowledge that Facility 2 was approximately AUD 10,250 in arrears. Even when the Statement of Claim ordered to be filed on 14th February by Aru J is filed on 23rd March, there is no mention of the deliberate act of withholding mortgage repayments and the consequent arrears. It is even worse when one considers the Further Sworn Statement of Mr Reilly initially dated 11th February 2014 and filed on 12th February 2014. In that sworn statement at paragraph 10 he says that on 28th January 2014 Mr James Hudson of Bred Bank issued a Notice of Demand to the First and Second Defendants of the Third Defendant Company. He exhibits a document which shows he and JTS had given unlimited guarantees and were equally liable for the mortgage debt but does not mention that fact in the body of his statement. There is also no mention that the reason for the issue of the Notice of Demand was Claimants' default.

16. The die was cast on 28th January 2014 when Bred issued their demand. When that was not satisfied proceedings were filed on 2nd June 2014. As pointed out in the judgment of 1st September 2015 there is a straightforward test in cases involving a claim for the exercise of powers of sale by a mortgagee. It was set out by Tuohy J in *National Bank of Vanuatu v Tambe [2007]* VUSC 105; Civil Case 237 of 2006 (14 December 2007).

"This Claim is for the exercise of powers of sale by a mortgagee. It is in standard form. What must be established is:

i. that the defendant has granted a mortgage of his property to the claimant
ii. that the mortgage is in default
iii. that notice of demand has been served on the mortgagor
iv. that the notice of demand has not been complied with and the mortgage remains in default"

17. When judgment was entered in favour of Bred in CC198 of 2014 in September 2015 it was established beyond any doubt whatsoever that a mortgage had been granted to Matana. There was no doubt the mortgage was in default (see above paragraphs 12 to 14). No one disputes that Bred issued a Notice of Demand in respect of the mortgage. No one has argued that the notice had not been complied with. The decision in CC 198 of 2014 was not appealed or otherwise challenged. Bred have now sold the property and what needs to be resolved is how should the net proceeds of sale, as set out in paragraph 5 above, be distributed.

18. The obvious starting point is the division of the mortgage facility agreed between the parties when the AUD loan account was set up. The split was 46.19% MT and AL and 53.81% for JAR and JTS. On that basis the starting point is AUD 207,166.91 and VT 3,198,917 should be paid to MT and AL and AUD 241,343.40 and VT 3,726,645 to JAR and JTS. These figures are arrived at by the simple calculations 448,510.31 x .4619, 448,510.31 x .5381 and 6,925,562 x .4619 and 6,925,562 x .5381. Without more that would be the split of the proceeds of sale but unfortunately it is not that straight forward.

19. The unchallenged evidence is that MT and AL continued making payments off the mortgage until July 2015. Those payments must be taken into account. They should be deducted from the amounts attributable to JAR and JTS set out above and paid to MT and AL. The best evidence of total of the resulting arrears comes from the sworn statement of Mr James Hudson filed in civil case 198 of 2014 on 19th August 2015. His evidence is that the arrears on the JAR and JTS facility were, at 19th August 2015, AUD 96,856.47. Taking into account arrears on the MT and AL facility of AUD 7,865.77 the AUD figures set out in paragraph 17 above should be amended to show an entitlement of AUD 296,157.61 to MT and AL and AUD 152,352.70 to JAR and JTS.

20. In addition, as there is no real doubt it was the actions of JAR and JTS which led to the mortgagee proceedings, they must bear the costs incurred in those proceedings. They are required to pay the mortgagee's costs as set out in the letters from Messrs George Vasaris & Co dated 11th and 15th February 2016 and the attachments. These are costs recoverable under the mortgage deed and guarantee as well as in the proceedings. As far as I am able to ascertain from the statement 11/2/16 the costs and expenses amount to VT 3,903,903. On that basis the total amount of the vatu account referred to in paragraph 18 above should be paid to MT, AL and Matana.

21. This still does not dispose of all the claims by the parties. In submissions it was said that a calculation of those damages was not "an exact science". I would agree but that still does not obviate the need for an equitable decision as to damages. We are here dealing with the proceeds from a forced sale by a mortgagee in possession. The property was put into possession and sold due to the direct and deliberate act actions of JAR and

JTS. They deliberately stopped making any payments on the mortgage. MT and AL continued to make payments but clearly Bred would not forego proceedings for ever on the basis that 50% of the mortgage was not being serviced. There is no dispute that during the period between December 2013 and September 2015 (when the order for possession was made) no payments whatsoever were made by JAR and JTS to Bred. This was despite the fact they were in complete control over what happened to 6 of the 8 units. JAR and his partner were living in one yet did not contribute any rent they should have paid to discharging the mortgage debt. There is no real information as to what happened to the income form the other units. They obtained, on what I consider to be dubious evidence, an injunction which imposed restrictions on what MT, AL and, in particular, Matana could do with their two units let alone the whole complex.

22. One example of the attitude of JAR and JTS is seen in their dealings with the insurance proceeds following the damage caused by cyclone Pam in March 2015. Ignoring any accusations or suggestions they under insured the buildings, when there were negotiations being conducted by Bred, loss adjusters, the insurance company and the parties; JAR and JTS through their lawyer made a suggestion that all the insurance proceeds be paid to Bred with a proportion to, "*...be applied to the arrears of the Matana loan".* In simple terms they wanted some of the insurance proceeds to be paid, presumably in preference to paying for repairs to the property, in reducing the arrears they created .

23. There is no doubt that JAR and JTS set out on a deliberate course to force a sale by Bred. They did nothing to persuade Bred to allow more time and they must now face the consequences. They must bear the losses.There are several sworn statements from real estate professionals. Mr Hamilton in his sworn statement filed 27th January 2015 suggests a one third reduction in the sale price of property subject to a mortgagee possession and sale. Margaret Sharon Charnely (sworn statement filed 27/1/15) is of the professional view the reduction could be 25 percent. An average of those two opinions would be 29 percent. I accept those figures and my finding is that the deliberate and sustained actions of JAR and JTS caused a loss in the sale price and therefore in the net proceeds of sale of 29%. In real figures this amounts to a loss of AUD 324,783.33. The percentage shared by MT and AL would be 46.19% or AUD 150,017.4. That sum should be deducted from the share of JAR and JTS and added to that of MT, AL and Matana.

24. In respect of the proceeds of sale paid into court following the sale by Bred I order that VT 6,925,562 be paid to Matana. This will, in effect, be a payment to MT and AL. They, as directors and shareholders of Matana Investments Ltd can decide on the distribution. If Mr Thompson and Ms Laithwaite require an order in different terms I would be prepared to make an order that that sum is paid to them in equal shares.

25. As regards the AUD amount of 448,510.31 I order AUD 446,175.03 to be paid to Matana. As above I would be prepared to make an order it is paid in equal shares to Mr Thompson and Ms Laithwaite rather than to Matana.

26. I order the sum of AUD 2,335.28 to be retained by the Chief Registrar of the Supreme Court pending agreement or taxation of costs.

27. The sums to be paid out can be paid to Messrs Geoffrey Gee & Co as lawyers for Matana on their undertaking to distribute the award in accordance with the wishes of the Directors and Shareholders of Matana Investments Ltd. If Messrs Geoffrey Gee & Co feel

that to be too onerous a task to undertake then the funds can be paid out in equal shares as indicated above. I have adopted this approach because whilst I am led to believe Mr Thompson and Ms LK Laithwaite are no longer partners they seem to maintain an amicable relationship.

28. As for costs, I see no reason why the usual ruler should not apply, namely that the costs are awarded to the successful party. This would seem to be Mr Thompson and Ms Laithwaite and Matana Investments Ltd. I order the Claimants in Civil Case No. 13 of 2014 to pay the costs of the Defendants in that case, such costs to be taxed on a standard basis if not agreed. In Civil case 198 of 2014 I order the Third Parties to pay the costs of the Defendant, such costs to be taxed on a standard basis if not agreed. I have no need to make any further order in respect of the Claimant's costs in Civil Case No. 198 of 2014 as they have been dealt with in the order made on 1st September 2015.

DATED at Port Vila this 29th June, 2017.

BY THE COURT

DAVID CHETWYND

Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEK LEK REPUBLIQUE DE VANUATU