

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

Civil
Case No. 15/1 SC/CIVL

BETWEEN: Westpac Banking Corporation
Claimant

AND: Regent Investments Pty Ltd
Defendant

Coram: Justice Aru

Counsel: Mr. N. Morrison for the Claimant
Mr. D. Thornburgh for the Defendant

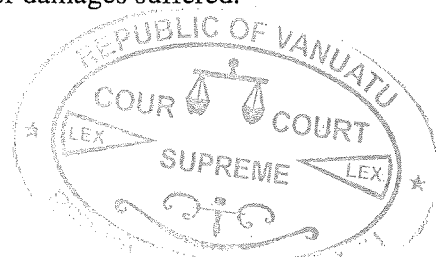
RESERVED JUDGMENT

Introduction

1. This is a claim by Westpac Banking Corporation (Westpac) as mortgagee seeking to enforce its rights under a mortgage. Westpac loaned funds to Regent Investments Pty Ltd (Regent) under a Business Finance Agreement (the loan agreement). The loan was secured by a mortgage over leased property title Lot 85 in Strata Plan 0035 (the Property).

Summary of the pleadings

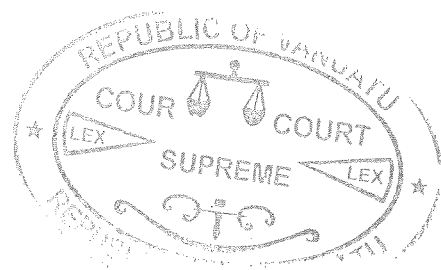
2. Westpac claims that Regent defaulted on its loan repayments. Upon such failure Westpac issued a notice of demand under the mortgage demanding full payment of all sums outstanding. The demand was not satisfied and now Westpac is seeking power of sale orders to sell the Property to recover its losses.
3. Regent in its defence admits it entered into a loan agreement to borrow funds from Westpac but says that the funds were given to third parties without its authorisation. It denies that the claimant is entitled to the relief claimed. It filed a counterclaim alleging breach of contract and negligence on the part of Westpac. It claims damages in the sum of AUD \$809,020.00 plus 5 % interest (AUD \$ 262,931.50 from October 2009 and accruing at AUD \$ 777.87 per week).
4. In response to the counterclaim Westpac admits the loan agreement and says it will rely on its terms for its full effect and denies any breach or damages suffered.



Background facts

5. The following chronology of events sets out background facts which are not disputed.

- 24 June 2009-Mr Andrew Picket as a director of Regent made the initial request for a loan facility with Westpac;
- 7 July 2009- Regent signed a building contract with Eaton Homes Limited for the construction of a house on the property at Whitesands;
- 12 October 2009- Westpac confirmed that the loan request was approved and forwarded the BFA offer to Regent to be signed in duplicate if the offer is to be accepted;
- 22 October 2009- Regent accepted the offer and signed the BFA;
- 29 March 2010- the Mortgage over the Property – lot 85 in strata plan 0035 was signed and was registered by the Director Land Records Department on 30 December 2011;
- 31 March 2010- the 1st draw down payment on the loan was made in the sum of AUD \$ 328,500 for purchasing the title;
- 16 June 2010- the 2nd draw down payment was made for AUD \$142,500 (comprising a deposit of AUD \$47,500 and Base Stage payment of AUD \$ 95,000);
- 28 June 2010- the 3rd draw down payment was made for AUD 95,000 being payment for the Frame Stage;
- 30 June 2011- the defendant made the last loan repayment;
- 23 August 2012 - the Notice of Demand dated 30 May 2012 was served giving Regent seven (7) days to settle the sum of AUD \$ 609,301.40 being the balance of the debt owing as at 16 December 2012;
- 19 September 2014- As of 19 September 2014 the defendant's loan account debt before write off was AUD \$ 624, 046;
- 6 January 2015-the claimant filed its claim and a defence and counterclaim was filed on 4 February 2016.



Discussion

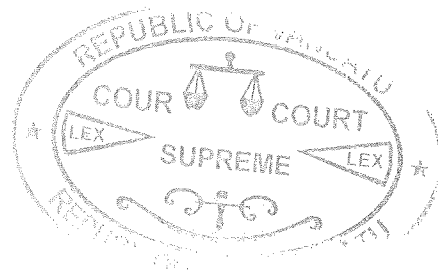
Preliminary issue

6. The preliminary issue raised by the defendant is whether Westpac authorised the Bank of the South Pacific (Vanuatu) Limited (BSP) to bring the proceedings. Mr Thornburgh submitted that Mr Morrison has not shown evidence that he is instructed by Westpac as the proceedings were brought by Westpac and remains in the name of Westpac not BSP. Second, it was submitted that there is no evidence that the debt has been assigned to BSP.
7. There are two sworn statements filed by the claimant tendered as Exhibits "C1" and Exhibit "C2". Both are deposed by Ms Elizabeth David. Exhibit "C1" was filed on 6 January 2015. She deposes that she is the Manager, Loans Management Unit of Westpac and was authorised by Westpac to make the sworn statement. Exhibit "C2" was filed on 13 July 2017. This was sometime after BSP had taken over Westpac's business and she deposes that she is now the Manager, Loan Management Unit of BSP. Furthermore she deposes that she is familiar with the File relating to the mortgage provided by Westpac and annexes the defendant's loan account statement "EDF 1" held by BSP. At the top of page I is headed "*Bank of South Pacific Limited – Account Transaction List*". It cannot be disputed that BSP has taken over and is responsible for the account.
8. In her oral evidence Ms David said that BSP took over and was responsible for Westpac mortgages.
9. In the absence of any evidence that Westpac has taken objection to BSP enforcing this mortgage, I am satisfied on the balance of probabilities, that on the evidence before me, BSP has taken over this mortgage from Westpac.

Second issue

10. The second issue is whether there was a breach of contract by Westpac.
11. Regent approached Westpac for a loan around June 2009. Westpac approved the request and offered a loan package under a loan agreement. Regent accepted the offer by its director Mr Pickett signing the loan agreement on 22 October 2009.
12. By accepting the offer, Regent accepted an Investment Property Loan of AUD \$630,000.00 (Six hundred and thirty thousand dollars Australian dollars). Second it accepted that the loan was for the "*purchase of land and house construction at White sands Resorts, Port Vila*". Other terms of the loan agreement were that:-

"Finance approval is subject to:-



- *All legal documentations are to be completed and executed to the Banks satisfaction prior to draw down of the loan*
- *Finance to be draw down progressively against builders invoices and engineers certificate on a cost to date cost to complete basis*
- *Interest only payment to met during period of construction*
- *Any overruns will be of own care*
- *Property to be fully insured at all times noting Westpac Bank as mortgagee”*

(emphasis added)

13. Under the building contract the parties agreed that progress payments will be made in the following five (5) stages:-

| <u>STAGE</u> | <u>PERCENTAGE OF CONTRACT PRICE</u> | <u>AMOUNT</u> |
|------------------------|-------------------------------------|---------------|
| • <i>Deposit</i> | <i>10%</i> | |
| • <i>Base stage</i> | <i>20%</i> | |
| • <i>Frame stage</i> | <i>20%</i> | |
| • <i>Lock up stage</i> | <i>20%</i> | |
| • <i>Fixing stage</i> | <i>20%</i> | |
| • <i>Completion</i> | <i>10%</i> | |

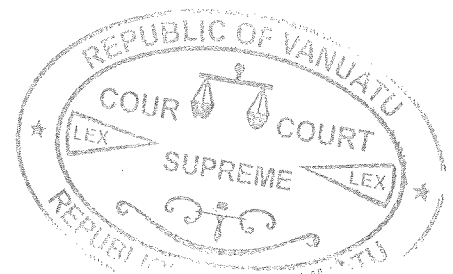
14. Eaton homes as the builder was obliged under the terms of the contract to provide a copy to Westpac indicating the payment stages.

15. The security for the loan was a mortgage over the Property which was registered to Westpac as mortgagee.

16. The Land Leases Act [CAP 163] provides that any principal sum due under a mortgage may be recovered by action in any competent Court (s58). Mortgages are enforced by application to the Court and upon such application the Court may issue power of sale orders (s59).

17. Under the terms of the current mortgage, Regent (mortgagor) acknowledged that it received from Westpac (mortgagee) a sum of AUD \$630,000.00. Clause 5.8 of the mortgage stipulates:-

“5.8



That upon the occurrence of an event of default as specified herein all moneys hereby secured shall immediately become due and the Mortgagor will repay the same upon demand AND to the extent possible by law it shall be lawful for the Mortgagee (whether the power of sale or any other power has or has not been sought to be exercised or exercised) to sue to recover and receive the same as and for debt under covenant”

18. On 13 April 2010 Mr Pickett was informed by Westpac that the first draw down for the land portion of the loan was drawn. This was in the sum of AUD 328, 500 and payment was disbursed on 31 March 2010. The second draw down was for the sum of AUD \$142,500.00. This covered the Deposit and Base stage. That draw down was approved by Mr Pickett on 9 June by email. The draw down was supported by engineering Certificate No 1 from Mainguy Consulting Engineer and Project Management (Mainguy) who were the engineers for the project. The second draw down was made on 23 August 2010 in the sum of AUD \$95, 000, 00. This was supported by Certificate 2 from Mainguy. This payment covered the Frame Stage.

19. It was a term of the loan agreement that during the period of construction loan repayments will be on interest only basis. From 29 July 2011 Regent ceased interest payments on the loan. Several attempts by Westpac to get the default rectified were unheeded or ignored. In his oral evidence in Court Mr Pickett admitted that it was a failed investment and that he was paying money and getting nothing.

20. On 29 September 2011 Mr Pickett emailed Westpac stating as follows:-

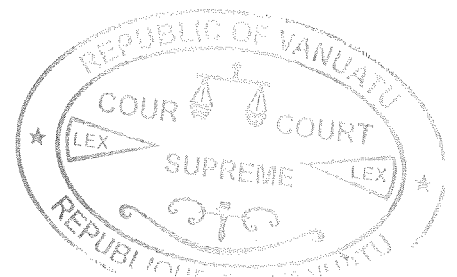
“Can you give me until close of business on Monday to make the payment to the Regent Investment loan account. I have negotiated that the loan will be paid out in full through the white sands project in the next 60 days”

21. No such payment was made. This led Westpac to issue their Demand Notice giving Regent seven (7) days to pay up the debt in full. At the end of the notice period the debt remained outstanding and still is.

22. In answer to the second issue, I am satisfied that there was no breach of contract by Westpac.

Result

23. It was within the claimants’ rights under the mortgage to apply for power of sale orders if the notice of demand is not complied with. I am satisfied that the debt remains unpaid and therefore I grant the relief sought as follows:-



Orders

- (1) The claimant as mortgagee is empowered to sell and transfer strata title property contained and described as 86/SP 0035 (Being Lot 86 in Strata Plan 0035) (the Property);
- (2) Pending such sale and transfer the claimant, as mortgagee or any agent or agents duly authorised by it in writing, are empowered to enter on the Property and act in all respects in the place and on behalf of the proprietor of the strata title, and to apply in reduction of the monies due and owing to the claimant all or any rent received in respect of the Property;
- (3) The purchase monies to arise from the sale and transfer of the Property and the monies received (if any) by the claimant pending such sale transfer shall be applied:-
 - a) Firstly in payment of the expenses of occasioned by the sale and transfer or going into and remaining in possession (as the case maybe) including the cost of the application;
 - b) Secondly, in payment of the monies then due and owing to the claimant as Mortgagee;
 - c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in order of their priority;
 - d) Fourthly, the surplus if any shall be paid into this Honourable Court pending further order;
- (4) The defendant shall pay the cost of and incidental to this suit;

Conclusion

24. Judgment is entered for the claimant and the counterclaim is therefore dismissed.

DATED at Port Vila this 19th day of November, 2019

BY THE COURT

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D. Aru
Judge

