IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 24/1770 COA/CIVA

BETWEEN: **GORDON ARNHAMBATH**
Appellant

AND: **BRED (VANUATU) LIMITED**
Respondent

Date of Hearing	***12 August, 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice R. Young*** ***Hon. Justice O. A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice E. Goldsbrough***
In Attendance:	***J. Boe for the Appellant*** ***S. Mahuk for the Respondent***
Date of Decision:	***16 August, 2024***

JUDGMENT OF THE COURT

1. Gordon Arnhambat, the Appellant, held the lease to residential property Title No. 12/0631/345 subject to a mortgage he had arranged and agreed with the Respondent to this appeal, BRED (Vanuatu) Limited, a local bank.

2. In April 2023, within an application filed in 2022, an order was made permitting the mortgagee, BRED Bank, the present Respondent, to sell the property following default in the terms of the mortgage. That decision was taken on appeal and in Appeal Case no. 676 of 2023 *[2023] VUCA 33,* this Court of Appeal delivered a judgment in favour of the Respondent Bank on 18 August 2023.

3. The Supreme Court delivered the decision on 3 June 2024, which is the subject of this appeal. That decision was made after a hearing and in response to the Appellant's urgent application to suspend the mortgagee sale order of 12 April 2023. That decision was to decline and dismiss the application of the Appellant. On dismissing the application, the Court ordered that the Appellant (then applicant) pay costs to be agreed or taxed to the Respondent. Those costs have not yet been agreed or taxed and so have not yet fallen due to be paid.

4. This appeal is brought on two grounds. The first asserts that the trial judge erred in dismissing the application when, following the decision of the Court of Appeal of August 2023, the Appellant had the financial capacity to pay off the outstanding loan and interest. The second ground of error is that the Court gave no weight to the Appellant's right to redeem his mortgage when he demonstrated that he had the financial capacity, through his son, to repay the outstanding loan.

Proceedings in the Supreme Court

5. The application heard in the Supreme Court contained substantially the same grounds for that application, that the Appellant's son had the ability to repay the outstanding loan because he had convinced another bank to refinance the transaction because he was a permanent civil servant and because the Respondent had been asked to forward to the new bank details of the outstanding loan.

6. In its decision, the Supreme Court found that the material filed in support did not support the submission that refinancing had been agreed. There was a finding that a request for refinancing had been made and that a loan officer was processing the request. The same material was exhibited as part of the Appeal Book, and having considered that same material, we agree with the trial judge's conclusion.

7. The appeal material also includes the request made by the new bank directly to the Respondent for them to provide details of the Appellant's indebtedness to them. In the absence of any authority from the Appellant for the release of that information, it is difficult, if not impossible, to see how the Respondent could comply with that request. The requested information was freely available to the Appellant, and he was entitled, but not the Respondent, to provide it to his son for the purpose of seeking refinancing.

8. In the decision, the trial judge also considered material suggesting that this notion of refinancing had been raised at earlier stages in these proceedings. She set out what this Court said in paragraphs 5 and 6 of its decision in *[2023] VUCA 33.*

9. At paragraph 7 of that same decision, this Court noted that the notice of demand had been served on the Appellant on 18 May 2022. Reference was also made to the application to adjourn those proceedings whilst the Appellant investigated refinancing.

Discussion

10. Following the decision of the Supreme Court, which is the subject of this appeal, the Appellant wrote to the Respondent urgently to seek the details of his outstanding loan to provide to the new bank. Both that letter and a letter from the new bank are included, without leave, in the Appeal Book at pages 19 and 20. As that material was not before the Supreme Court, it should not have been included in the Appeal Book without first seeking leave. The Respondent does not object to this Court granting leave for those documents to be submitted on this appeal but makes the submission in response that it was only after the hearing in the Supreme Court that this request was made to the

Respondent by the Appellant at a time when the Respondent had already accepted an offer on the property.

11. As to the ground that the Supreme Court, in its decision, failed to give any weight to the right of the Appellant to redeem the mortgage, we respectfully disagree. All the Appellant had to do to redeem his mortgage was to pay the required sum. Even at this hearing, the same point was made as in the earlier Court of Appeal hearing, that there was no suggestion that the right to redeem existed but that it was to be exercised within a reasonable period following default and could not be exercised by making a promise to pay but only by making the actual payment. This has not been done and only promises that funds may become available via a third party at some unspecified future time.

12. Page 19 of the Appeal Book does no more than confirm that the new bank has not agreed to refinance but is still to complete the "loan assessment review". Until that has been done and a positive response has been given, refinancing remains nothing more than a possibility.

13. Therefore, the ground that the trial judge erred in dismissing the application because the applicant had shown that refinancing to be available must fail. As has been said before, only the presentation of an actual payment, as opposed to a future promise, could satisfy that ground.

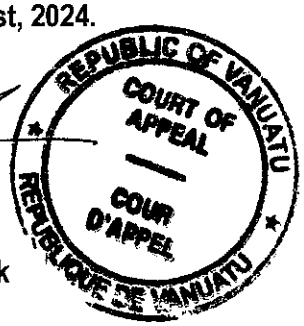
14. Equally, the second ground asserting that the appellant was being denied his right of redemption must also fail. There is no denial of the right to redeem brought about by the dismissal of the application to suspend the sale. Redemption, though, only takes place when the debtor presents a payment representing the entire debt and that, to date, has not taken place. That right must be exercised within a reasonable period of time, and whether that has elapsed will remain a question of fact that will only be determined when payment is offered. As no payment has yet been offered, the question has not yet arisen. If the question does arise, one factor that may well be considered is the stage at which the creditor has reached in the sale process.

Decision

15. The appeal is dismissed for the reasons given. Costs on this appeal are fixed at VT 10,000 and are to be paid by the Appellant to the Respondent. We also fix the costs of the proceedings in the Supreme Court at VT 10,000 following discussions between counsel to avoid further delay and costs. They are to be paid by the Appellant within 28 days from today.

DATED at Port Vila, this 16th day of August, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek