

BETWEEN: Bred (vanuatu) Limited
Claimant

AND: Sam Dan Avock A.K.A.M
First Defendant

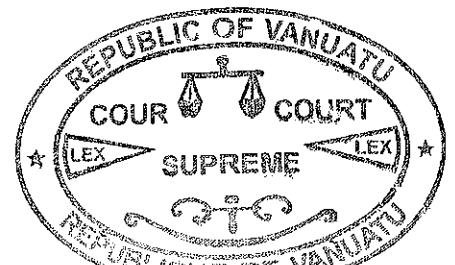
AND: Towasi Flora Avock
Second Defendant

Date of HEARING: *28th day of July, 2017 at 2:00 PM*
Before: *Vincent Lunabek*

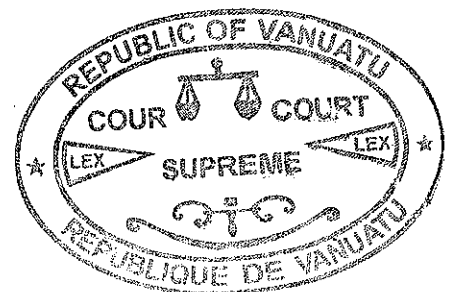
Counsel: *Ms Stephanie Mahuk for Claimant*
Mr Andrew Bal for Defendants

JUDGMENT

1. This is a claim by the Claimant Bred (Vanuatu) Limited seeking orders from the Court to empower the Claimant as mortgagee to exercise its powers of sale over leasehold property title 11/OH31/007 (Lease "007"). The Claimant also applies pursuant to section 59 of the Land Leases Act [Cap 163].
2. Below is the summary of the background leading up to the claim against the Defendants.
3. The Claimant holds a Banking Licence pursuant to the provisions of the Financial Institutions Act [Cap 245] (as amended).
4. The Defendants are the customers of the Claimant. The Defendant, Sam Dan is the registered proprietor of lease hold title number "007".



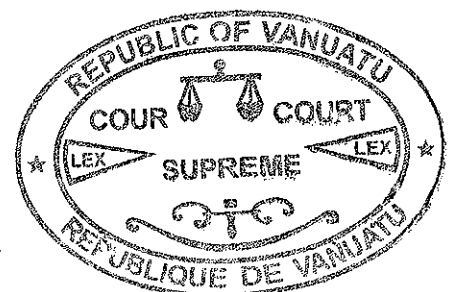
5. The Defendants applied to the Claimant for a land loan and an overdraft on or about August 2011.
6. The Claimant forwarded a letter of offer to the Defendants dated 09 September 2011 which was accepted and executed by the Defendant on 09 September 2011 accepting the offer and acknowledging the pledge over their term deposit held by the Claimant as security.
7. On or about January 2012 the Defendants applied for the above loan to be varied to restructure existing facilities and the same required a third party collateral mortgage to be registered as security over lease title 007 held in the name of Sam Dan which appeared as one of the named Defendants.
8. A Variation Letter of Offer was issued on 11 January 2012, the same was accepted by the Defendants and a Surety Agreement was executed accordingly by the Defendant, Sam Dan for a third party collateral mortgage to be registered as security over lease 007.
9. Further variations were made to the Defendants' loan facilities on 13 September 2012, 09 December 2014 and 08 February 2016 by way of variation letters of offer executed by the Defendants and Surety Agreement executed by the Defendant Sam Dan.
10. The third party collateral mortgage was varied accordingly pursuant to the above variation letter of offer.
11. The terms and conditions of the variation letters of offer remained the same save for the facility amount and corresponding repayments.
12. By virtue of the letter of offer, as varied on 08 February 2016, the Claimant and the Defendants entered into a loan agreement for a housing loan facility of VT12,238,027 (twelve million two hundred and thirty eight thousand and twenty seven vatu). The express terms of the said agreement are as follows:-



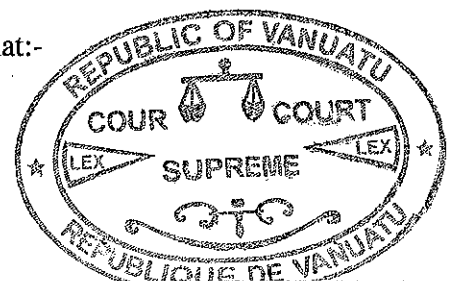
- a) The Claimant would provide a loan facility to the Defendant in the sum of VT12,238,027 (twelve million two hundred and thirty eight thousand and twenty seven vatu).
- b)
- c) The Defendant would repay the loan monthly at VT104,000 (one hundred and four thousand vatu) in interest repayments for the first 3 months, subject to review on 04 April 2016.
- d) Interest charged at 9.99% per annum same being variable at the Bank's discretion.
- e) Should the Defendant default on any obligations under the loan which in the opinion of the bank may detrimentally affect its securities and/or facility arrangements with the Defendants, the bank may make all monies lent under the agreement and any interest thereon immediately payable.

13. By virtue of the letter of offer, as varied on 08 February 2016, the Claimant and the Defendant entered into a loan agreement for a personal facility of VT64,019 (sixty four thousand nineteen vatu). The express terms of this personal loan facility are as follows:-

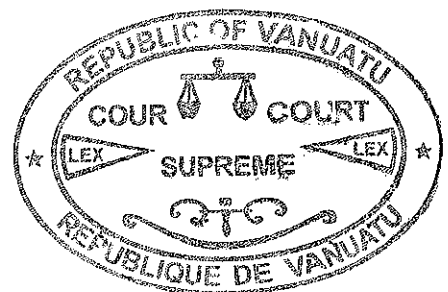
- a) The Claimant would provide facility to the Defendant in the sum of VT64,019 (sixty four thousand nineteen vatu).
- b) Security held is the registered mortgage over Leasehold title 11/OH31/007.
- c) The Defendant would repay the loan monthly at VT16,643 (sixteen thousand six hundred and forty three vatu) in principal plus interest at 19.25% per annum same being variable at the Bank's discretion.
- d) Should the Defendant default on any obligations under the loan which in the opinion of the bank may detrimentally affect its securities and/or facility arrangements with the Defendant, the bank may make all monies lent under the agreement and any interest thereon immediately payable.



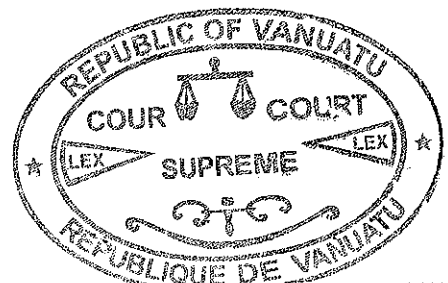
- e) The Defendant would repay the loan monthly at VT16,643 (sixteen thousand six hundred and forty three vatu) in principal plus interest at 16.00% per annum same being variable at the Bank's discretion.
14. The Defendant would employ her best efforts to settle the outstanding principal amount and interest due and payable within the time frame stipulated.
15. The Defendants obtained the Consent to mortgage over the Property and registered a third party mortgage in the Claimant's favour as Mortgagee dated 05 June 2012 and varied on 23 November 2012 and 10 February 2015.
16. Drawdown occurred in relation to the Letters of Offer and variations thereof, the most recent drawdowns being 09 February 2016 on the land loan and 14 August 2015 on the personal loan.
17. The Defendant has breached the Agreement on the land loan.
- a. The Defendants have failed to settle outstanding principal amount and interest due to the Claimant.
- b. The Claimant has not received any monies from the Defendants since and arrears pertaining to the Interest and Principal payable in relation to the land loan are totalling VT330,756.
- c. The Claimant has forwarded a Notice of Demand to the Defendants dated 16 November 2015 and 29 March 2016 on arrears with regards to her land loan arrears however the Defendant has failed to oblige to the request for payment contained therein.
18. The Defendants have breached and is in breach of the terms of the Loan Agreement having failed to comply with the Notice of Demand.
19. The Claimant says it is entitled to exercise its rights pursuant to the Mortgage.
20. The Defendants have breached the personal loan agreement in that:-



- a. They have failed to settle outstanding principal amount and interest due to the Claimant.
 - b. The Claimant has not received any monies from the Defendants since and arrears pertaining to the Interest and Principal payable in relation to the personal loan which are totalling VT16,395 as at 18 May 2016.
 - c. The Claimant has forwarded a Notice of Demand to the Defendants dated 16 November 2015 and 29 March 2016 on arrears with regards to her personal loan arrears however the Defendants have failed to oblige to the request for payment contained therein.
21. The Defendants have breached and is in breach of the terms of the Loan Agreement having failed to comply with the Notice of Demand.
 22. The Claimant says it is entitled to exercise its rights pursuant to the Mortgage.
 23. The Claimants claims among other relief for an order that the Claimant as Mortgagee, be empowered to sell and transfer lease hold title 11/OH31/007 by such means and in such manner as it shall deem fit.
 24. The Claimant applies pursuant to Section 59 of the Land Leases Act [Cap 163] on 29 June 2016.
 25. The Claim is supported by the sworn statement of Monique Stephens filed 29 June 2016.
 26. There was no response or a Defence filed since the Defendant were served with the claim and the statements. Emma Sam filed a sworn statement of service to that effect on 30 June 2016.
 27. The Claimant has filed an Application for default judgment on 27 July 2016 with supporting sworn statement.



28. As this is not a claim for monetary judgment but for the exercise of the Mortgagee power pursuant to Section 59 of the Land Leases Act [Cap 163], the Court directed by orders dated 22 June 2017 and 13 July 2017 that the Claimant served the Defendant in person as their lawyer on records (Mr Andrew Bal) did not attend at the conferences and pre-trial conferences) to ensure that they have received the claim, the application pursuant to Section 59 of the Land Leases Act, the application for default judgment and all sworn statements in support of the claim and in support of the applications so as to ensure that they are represented before the Court.
29. The Claimant effected this as evidenced by the sworn statement of Kapa Tunis and Mayane John.
30. The claim and the application for default were listed for hearing on 28 July 2017.
31. On 28 July 2017, the Court heard the application for default judgment, the claim and the application pursuant to S. 59 of the Land Leases Act with respective sworn statements in support.
32. The Court heard submissions from the Claimant. The Court also heard counsel for the Defendants (who appeared on the date and time of the hearing) and made submissions.
33. In this case, the Court is satisfied on the basis of the sworn statement of Monique Steven of the following:
- a) That the Defendants have granted a mortgage of their property to the Claimant (Annexure D is the registered mortgage and upstanding Annexes F and H are in support);
 - b) That the mortgage is in default (Annexures J and K);
 - c) That notice of demand has been served on the mortgagors (Annexures L);
 - d) That the notice of demand has not been complied with and the mortgage remains in default.



34. The principles in respect to mortgagee powers of sale are applied in following cases:

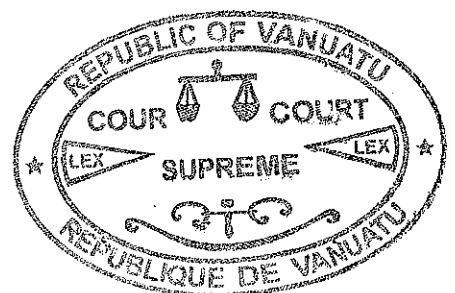
- National Bank of Vanuatu v. Tambe [2007] VUSC 105.
- ANZ Bank Ltd v. Traverso [2012] VUSC 222 confirmed by the Court of Appeal in Traverso v. ANZ Bank (Vanuatu) Ltd [2013] VUCA 8. I apply them here in this case.

35. In the Course of discussion with Mr Andrew Bal on behalf of the Defendants, he accepted that the judgment be entered in favour of the Claimant as it is the difficult reality that the Defendants are facing now.

36. On the basis of the above, the Court grants the relief sought in the claim and application pursuant to S. 59 of the Land Lease Act and by default.

37. The Court makes for the following orders:-

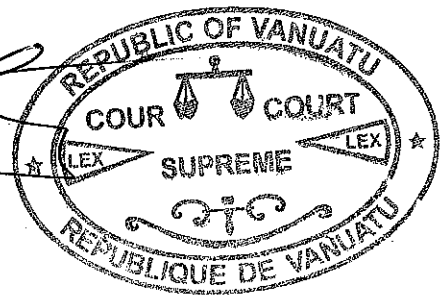
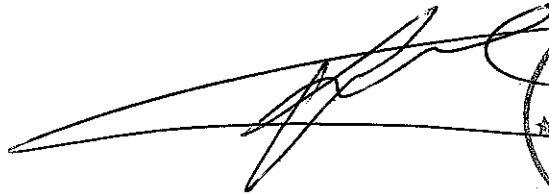
1. An order that the Claimant as Mortgagee, be empowered by such manner as it shall deem fit, to sell and transfer the Leasehold Property contained and described as titles number 11/OH31/007.
2. An order that pending such sale and transfer the Claimant as Mortgagee, or any agent or agents duly authorised by it in writing, be empowered to enter on the Property and act in all respects in the place and on behalf of the proprietor of the leases, and to apply in reduction of the monies due and owing to the Applicant all or any rent received in respect of the said property.
3. An order that the purchase monies arising from the sale and transfer of the Property and the monies received (if any) by the Claimant pending such sale and transfer shall be applied:
 - a) Firstly, in payment of the expenses occasioned by the sale and transfer or going into and remaining in possession (as the case may be), including the costs of this application.



- b) Second, in payment of the moneys then due and owing to the Claimant as Mortgagee.
 - c) Thirdly, in payment of subsequent registered mortgages and 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. An order that the Defendants pay the Claimant's costs assessed at 20,000 vatu by 30 August 2017.

DATED at Port Vila this 3rd day of August, 2017.

BY THE COURT



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Vincent LUNABEK
Chief Justice