

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

Civil
Case No. 17/1394 SC/CIVL

IN THE MATTER OF:

Mortgage Dated 23 October 2012 over
Strata Title Numbers 1/SP0005, 2/SP0005,
3/SP0005, 4/SP0005. 5/SP0005 and
32/SP0005 being as contained in Lease title
12/0913/462

AND IN THE MATTER OF:

Land Leases Act [Cap. 163] as Amended

BETWEEN:

Stage Four Limited (as Trustees for the
Montreal Trust)

Claimant

AND:

Blue Gum Holdings Limited

Defendant

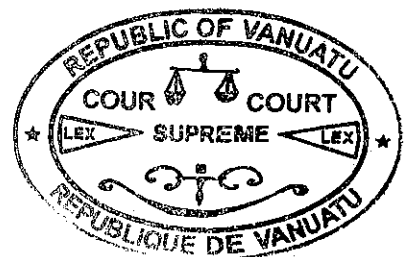
Date of Hearing: March 2nd 2018

Date of Judgment: March 19th 2018

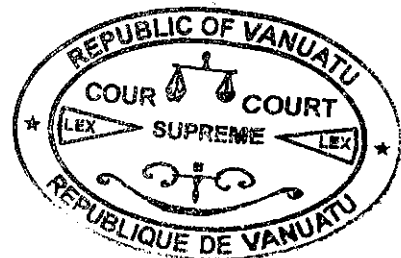
Before: JP Geoghegan

Appearances: Counsel – Dane Thornburgh for the Applicant, Andrew Fielding
Counsel - Nigel Morrison for Stage Four Limited (Submissions)

JUDGMENT

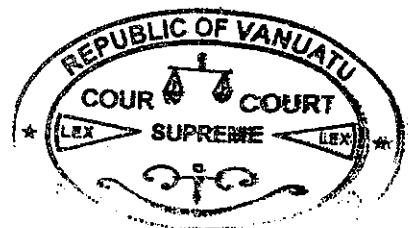


1. These proceedings involve a claim by Stage Four Ltd ("*Stage Four*") for an order empowering it to sell certain strata title property contained in lease title 12/0913/462 pursuant to a mortgage held by State Four over those properties.
2. This judgment is to determine an application by Andrew Felding, the provisional liquidator of a company known as 100% Pur Fun Limited ("*Pur Fun*") to be joined as a party to the proceedings. The broad backdrop to the proceedings involves a dispute regarding the ownership, management and operation of Breakas Resort located in Pango. The strata titles in respect of which an order for sale is sought are located adjacent to Breakas Resort.
3. There are related long standing and complex civil proceedings relating to a dispute between the shareholders of Pur Fun which owns and operates Breakas Resort. Those proceedings are civil claim 149 of 2013. The shareholders in 100% Pur Fun are Albino Salpietro, George Winslett and Sean Winslett.
4. In June 28th 2013, Mr Salpietro obtained an injunction against Pur Fun preventing it from disposing of any interest in Breakas Resort and preventing either George Winslett or Sean Winslett from taking any action which would further the disposal of such interest. Mr Salpietro also filed a petition for the winding up of Pur Fun and the appointment of a liquidator.
5. On December 15th 2014, the applicant in these proceedings, Mr Andrew Felding was appointed as provisional liquidator of Pur Fun.
6. Mr Felding maintains that in his role as provisional liquidator he has uncovered unauthorized payments from Pur Fun to directors and shareholders of Bluegum Holdings Ltd ("*Bluegum*") and Stage Four Ltd. He has also uncovered unauthorized payments from Pur Fun to another company Credit Corporation in relation to the payment of mortgage payments to Credit Corporation on behalf of Bluegum



Holdings Ltd. Credit Corporation had originally held the mortgage as mortgagee but had subsequently transferred that mortgage to Stage Four.

7. Broadly, it is the assertion of Mr Fielding that the mortgage to Credit Corporation has amounted to a fraud on Pur Fun and that the assignment of the mortgage from Credit Corporation to Stage Four was a deliberate endeavor on the part of the shareholders of Stage Four and Bluegum to extract funds from Pur Fun to which they were not otherwise entitled. Mr Fielding wishes to set aside the transfer and registration of the transfer of mortgage from Credit Corporation to Stage Four on the basis of the alleged fraud referred to and he wishes to stay the mortgage enforcement proceedings to ensure that the property which is subject to the mortgage is preserved pending the pursuit of recovery of monies on behalf of Pur Fun, from not only Bluegum Holdings and Stage Four but other associated entities.
8. The sworn evidence of Mr Salpietro who was a Director of Pur Fun between January 14th 2000 and May 2nd 2013, as well as a beneficial shareholder of one third of the shareholding of the company is that at no time did the Board of Directors of Pur Fun enter into any loan agreement or borrow any money from Credit Corporation.
9. Despite that however, Mr Fielding's evidence is that his investigations have identified significant payments to that company together with significant drawings in favour of Mr George Winslett. It is the position of Mr Fielding that further investigation is required regarding this matter, as on the face of it, it amounts to improper use of the assets of Pur Fun.
10. The history relating to the relevant mortgage is set out in a sworn statement of Robert John Herd dated June 9th 2017. Mr Herd is a Director of Stage Four. The following matters are apparent from Mr Herd's sworn evidence:-
 - a) That on January 9th 2012, George Winslett as a Director of Breakas Holdings Ltd, signed a loan agreement with Credit Corporation for the advance of Vt 141,000,000 to Breakas Holdings. Security for the loan,

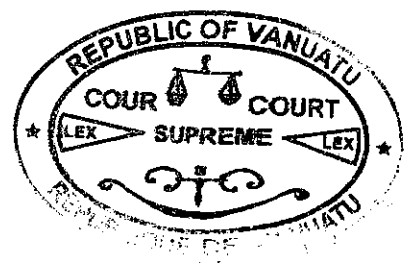


in part was the granting of a third party mortgage over the titles which are the subject of these proceedings, granted by Bluegum. Bluegum executed a mortgage on October 23rd 2012 and it was registered on December 31st 2012. Subsequently, a further advance of Vt 16,375,000 was agreed to and further security was provided, the exact nature of which does not need to be specified.

- b) On November 15th 2013, Credit Corporation assigned the mortgage to Stage Four in consideration of the sum of Vt 52, 827, 795.
- c) On June 23rd 2006, Stage Four's lawyers served a notice of demand on Bluegum Holdings for all monies then due and owing under the mortgage which amounted to Vt 76, 600,303. It is contended that no sums have been repaid by Bluegum and that accordingly as at the date of Mr Herd's statement, the outstanding sum owing under the mortgage was Vt 86, 382, 852.

11. In a sworn statement dated September 26th 2017, Mr George Winslett deposed as to the following:-

- a) That he was a former director and beneficial shareholder of Breakas Holdings which is a company owned and operated by Robert Herd.
- b) When the loan advance was obtained from Credit Corporation the payments were approximately Vt 1,800,000 per month. Mr Herd approached Mr Winslett and asked if the repayments of the Credit Corporation loan could be made from Pur Fun which was operating Breakas Resort. It was intended that this would be for a period of some three months. At that time it was hoped that the property secured under the mortgage could be sold by Breakas Holdings and Mr Winslett was advised by Mr Herd that from the proceeds of sale he would be able to pay Mr Salpietro the monies which were the subject of the claim in Civil Case No. 149 of 2013. Accordingly payments in the amount of Vt 1,800,000 per month were paid to Credit Corporation by Pur Fun.



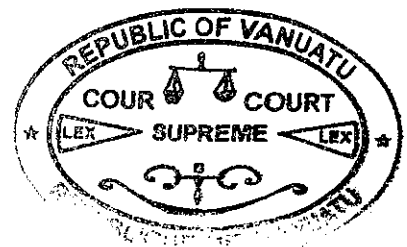
- c) That the payments were never authorized by any other Directors or shareholders of Pur Fun and that such payments occurred without the knowledge of Mr Salpietro. No less than Vt 23,400,000 was paid by Pur Fun in respect of these mortgage payments. They were unrelated to the operation of Breakas Beach Resort.
- d) That Mr Herd was aware at all times that the relevant sums were coming from Pur Fun and that such payments were being made without the knowledge of Mr Salpietro.
- e) In November 2012, Breakas Holdings through Mr Winslett and Mr Herd were trying to refinance the Credit Corporation lines and Mr Winslett had come to an agreement with Credit Corp to obtain an interest only loan so that he could run a restaurant on the land which is the subject of these proceedings. Mr Winslett maintains that without his knowledge Mr Herd treated the management of Credit Corporation to a trip to Australia to attend a rugby league game and that as a result Credit Corporation then agreed to sell the mortgage to Stage Four. Mr Winslett says that at no time was his permission sought or given for the sale of the mortgage from Bluegum to Stage Four. Further Mr Winslett says that while he signed documents creating the original mortgage obligations of Bluegum he was not a director of that company and had no right to sign those documents but did so because he was requested to do so by Mr Herd.

12. It is the evidence of Mr Winslett that Mr Herd is effectively perpetrating a fraud.

Submissions

13. For the claimant it is contended that the enforcement proceedings brought by the claimant in respect of a registered mortgage are undefended. The claimant criticized the assertions as to fraud on the basis that Mr Fielding does not:-

- a) Particularize any of the alleged payments.



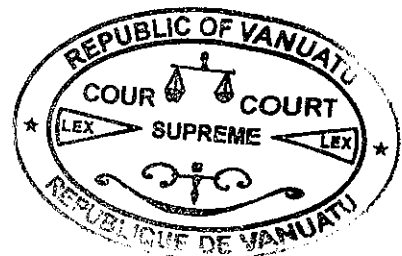
- b) Stipulate how those payments are fraudulent.
- c) Identify how Stage Four could have committed the alleged fraud as neither it nor Mr Herd were controllers of the relevant bank count.
- d) Identify or, for that matter claim any interest in the defendant's land to displace the position of the claimant as a secured creditor and a registered proprietor of a mortgage over the defendant's lots.
- e) Address why he has ignored authorizing minutes which authorize the loan arrangements.

14. It is asserted on behalf of the claimant that Mr Fielding's claim at its highest can only be that of an unsecured creditor and insufficient reliable evidence has been adduced to show that the claimant is not entitled to its remedy as a registered proprietor of the registered mortgage over the subject land.

15. In support of the application, Mr Thornburgh referred me to the judgment of the Chief Justice in Attorney General v. Pacific International Trust Co [1998] VUSC 4. The brief facts in that decision were that the Attorney General, as plaintiff in the proceedings had obtained from the Supreme Court restraining orders freezing various accounts operated by the defendant. The party seeking to be joined to those proceedings had an interest in those accounts.

16. The Chief Justice declined the relief sought by the applicant in that proceeding but referred to various English authorities which examine the approach to be taken in applications of this kind and referred to authorities which demonstrated both a broad and narrow approach in respect of such matters. The Chief Justice referred to the broad approach demonstrated by the judgment of the English Court of Appeal in Gurtner v. Circuit¹ where Lord Denning expressed the view that a party could be added where the determination of proceedings would directly affect either the legal rights or the finances of the person sought to be added. Diplock LJ however referred

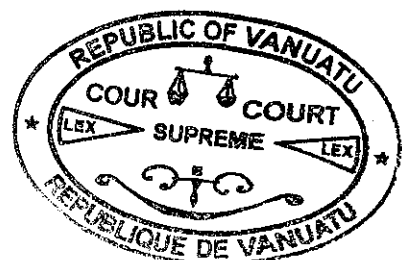
¹ [1968] 2QB587



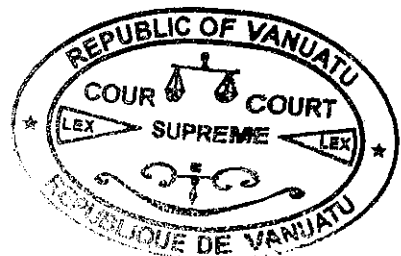
to joinder only being required where the action before the Court could not be completely and validly constituted without the applicant being a party.

17. A narrower approach was taken in Amon v. Raphael Tug and Sons' Ltd² where it was determined that the test was whether or not the question to be settled was one which cannot be effectively and completely settled unless the applicant for joinder became a party. It was determined that it is insufficient for a joinder that a person has a commercial or indirect interest in the resolution of the dispute, rather it must be a direct and legal interest.
18. It was contended by Mr Thornburgh for the applicant that the only way that Pur Fun could challenge the position is by becoming a party to these proceedings. I do not accept that submission however.
19. Rule 3.2 of the Civil Procedure Rules provide that:-
- "3.2 (1) The Court may order that the person becomes a party to a proceeding if the person's presence as a party is necessary to enable the Court to make a decision fairly and effectively in the proceeding".*
20. While the allegations of fraud in this case are concerning, there are allegations in respect of various entities and individuals. It is clear that Mr Fielding wishes to further investigate these allegations. However the claimant has a validly registered mortgage in respect of which it is entitled to seek enforcement. The addition of Mr Fielding as liquidator of Pur Funis not necessary to determine the issue before the Court which is the right of the mortgagor to enforce its mortgage. The presence of Mr Fielding is not necessary to enable the Court to make a decision fairly and effectively in these proceedings given the subject matter of them.

² [1956] 1QB357



21. As to Mr Thornburgh's assertion that this is the only way in which the liquidator can "challenge" what has occurred, it is clear that the liquidator can take separate proceedings against the parties he alleges have been guilty of fraudulent behavior either in their capacity as directors of Pur Fun or in some other capacity.
22. In addition, Mr Salpietro has a registered caution in respect of the subject land and the mortgage will not be able to be discharged without the removal of that caution. While Mr Salpietro is an individual entirely distinct from Pur Fun, the interest of the parties are similar.
23. In my assessment any allegations of fraud as being made by the provisional liquidator should be the subject of separate proceedings which will particularize the fraud and name as parties, the individuals or entities responsible for it. Those are matters which are not relevant to the issue to be determined in these proceedings which is simply the right of Stage Four to enforce its mortgage. The joinder of Mr Felding is not, as I have said, necessary to determine the issue of whether or not the claimant should be granted an order for sale.
24. In those circumstances, the application by Mr Fielding to be joined to the proceedings is dismissed.
25. The claimant is entitled to costs and costs are awarded on a standard basis to be agreed within 28 days failing which they are to be taxed.



DATED at Port Vila this 19th day of March 2018

BY THE COURT

.....
JP GEOGHEGAN

Judge

