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

Civil
Case No. 98 of 2020

BETWEEN: NATIONAL BANK OF (VANUATU) LTD

Claimant

MARC ATI

AND: Defendant

Date of Hearing:	***18th August, 2020***
Delivered:	***17th September, 2020***
Before:	***The Master Cybelle Cenac-Dantes***
In Attendance:	***Stephanie Mahuk counsel for the Claimant, Sarkiusa Kalsakau counsel for the Defendant***
Present:	

JUDGMENT

Headnote

Application for Summary Judgement – Specific Performance -

A. INTRODUCTION

1. This is an Application for the court to enter Summary Judgment for the defendant to be compelled to execute certain mortgagee obligations under loan agreements.

B. CLAIMANT'S CASE

2. The claimant contends that the defendant has no real prospect of defending the claim for the following reasons:

(i) That loans were advanced to the defendant by the claimant, upon his request, wherein he offered certain property collateral to secure said loans.

(ii) That consequent upon the request and collateral tendered, the principal sum was advanced to the defendant in the amount of approximately USD$1,431,112.75 and VT50,240,586 with present principal and interest due in the amounts of USD$2,052,464 and VT149,281,105.

(iii) That the defendant was in receipt of all the aforementioned funds which were used for the purposes intended.

(iv) That the defendant at all times entered freely into these transactions and at no time indicated any misunderstanding of the process, yet now refuses to execute documents to allow the bank to up-stamp its mortgage in order to realise sale for payment of the full debt or else sign loan agreements for the purpose of registering mortgages to ensure that it has security for the amounts loaned; and

(v) Finally the claimant states that the defendant cannot use as a defence to specific performance (1) that the bank already has power of sale orders, (2) that the bank failed to explain the ramifications of its letters of offer and (3) that the bank is estopped from using recent valuations for the property.

C. DEFENDANT'S CASE

3. The defendant's entire defence to the claim for specific performance is that the Bank did not properly explain to him any of the factors raised in this claim, and they were not envisaged by him when he signed the letters of offer. He states further, that the Bank also failed to explain the full effect of converting the Vatu loan to a USD loan if he was to fall into default and that the bank is estopped from claiming a lower value on the property than what was originally accepted when the loans were granted.

4. His counsel emphasized that it was never the intention of the parties to use those properties aforementioned as security and that his client did not sign any documents to that effect.

D. LAW

5. Rule 9.6 directs the court as to what it must consider in such an application:

(7) If the court is satisfied that:

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(a) The defendant has no real prospect of defending the claimant's claim or part of the claim; and
(b) There is no need for a trial of the claim or part of the claim, the court may;
(c) Give judgment for the claimant for the claim or part of the claim; and
(d) Make any other order the court thinks appropriate.

(9) The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact or a difficult question of law.

6. My task therefore is to determine whether the defendant has a real prospect of defending his case. In other words, he must be able to demonstrate that it is a prospect that is more than fanciful, and in doing so, if I am satisfied that there is a substantial question of fact or law to be tried then I am precluded from granting summary judgment.

E. DISCUSSION

7. From the 30th May, 2011 to 30th June, 2016 the defendant had taken various loans with the claimant Bank for the purpose of financing his business venture. Over the course of those 5 years the defendant had taken approximately 7 different loans of varying amounts:

    1. 30th May, 2011 for VT25 million.
    2. 25th April, 2012 for VT20 million.
    3. 31st October, 2013 for VT135,007,400 to amalgamate existing loans.
    4. 29th January, 2015 for up-stamp of VT28 million to purchase equipment and supplies.
    5. 22nd August, 2015 to convert Vatu loan to USD to a limit of USD$1,539,109.
    6. 21st October, 2015 for VT50 million to up-stamp existing mortgage to accommodate an overdraft to purchase supplies.
    7. 30th June, 2016 to convert Vatu loan to USD to a limit of USD$1,733,313.

8. In his defence, the defendant made no direct admission of having signed the letters of offer with the Bank and offering the aforementioned properties as collateral. His sworn statement of the 18th August, 2020, in response to this application, at paragraph 2, suggest that he did sign the agreements, but that he had informed the claimant that he could not offer the lease titles ending 059, 002 and 120 as collateral.

9. The sworn statement of Steve Buchanan, the Head Credit with the claimant, in support of the present application, exhibited all 7 written loan offers made to the defendant, over the 5 year period, all of which were signed, both by the claimant and the defendant.

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10. On the face of it, it is apparent that the defendant entered into the agreements as pleaded by the claimant and that he indeed offered all the security as stated by the Bank.

11. There is no doubt therefore that the claimant has provided irrefutable proof that clear and unambiguous agreements exist between itself and the defendant to warrant an order for specific performance for the purpose of them realizing sale and repayment of the debt in full.

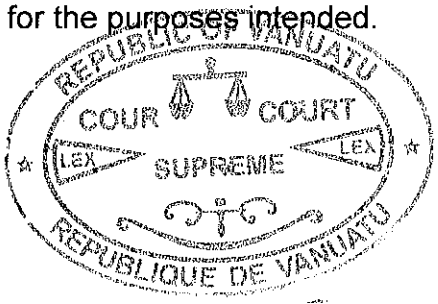
12. The usual defences to specific performance require a defendant to prove at least one of the following:-

(1) That the transaction was fraudulent or illegal;
(2) That there was delay that was so unreasonable that for the claimant to assert a right would cause injury or prejudice to the defendant;
(3) That the claimant acted in bad faith;
(4) That there was mistake or misrepresentation in the terms of the contract;
(5) That the contract required an impossible degree of supervision;
(6) That the contract was entered into with no consideration.

13. The defendant has stated that he was misled by the Bank and ill-advised in relation to the conversion of the vatu loan to a USD loan. This would appear to be patently incorrect as both letters of offer clearly stated, in plain english, under the heading "Foreign Currency Loans Only":

> Exchange rate currency fluctuations may have an impact on loan repayments and also on the value of your, and/or a guarantors investments or assets for which this facility is taken. It is not the banks role or responsibility to advise, monitor, manage or do anything to protect your exposure to loss because of exchange rate currency fluctuations. You and/or the guarantor are asked to consider the exchange rate risks very carefully and seek independent legal and financial advice.
> [my emphasis]
>
> Unless specifically stated, interest rates and fees may be varied by the Bank, in the light of conditions prevailing from time to time. Although we will endeavour to notify you of any change to fees, if the Bank does not do so for any reason, this will not prevent the charging of the new or adjusted fee.

14. The language of the offer is clear and unambiguous. The conversion loans provided the defendant with exactly what had been offered by the Bank, which was a lower interest rate of 5% as compared with previous interest rates ranging from 11% to 15.25%. The defendant took advantage of this lower interest and would have no doubt benefited from it. He was provided with all funds under the letters of offer which he used for the purposes intended.



15. The Bank was clear that neither they nor their lawyers held themselves out as his advisors in the matter of his risk exposure to fluctuating currency rates, and that it was open to him to seek, not only independent legal advice but also financial. Consequent upon this offer, the defendant offered up 6 properties as collateral, together with his business assets. His defence that this was never his intention is quite untenable as it is highly improbable that such an error could have been made over the course of 5 offers when more than just titles 059 and 061 were provided.

16. The defendant has not made out any of the defences to specific performance and I cannot find that there is any substantial question of law or fact to be tried.

17. I do not accept that it is a defence to specific performance for the defendant to argue that the Bank is now estopped from claiming a lower valuation than was originally accepted when the loan offer was made.

18. Valuations follow the market and they can rise and fall. A bank always takes a risk when it offers loans based on valuations but it nevertheless takes the risk. A defendant cannot then choose to benefit from a favourable valuation, yet, if the value falls, chooses to withdraw himself from the agreement altogether, pleading that the bank is entitled to no more security that he offered under the original valuation. If the value of the most valuable of the properties had diminished, then the bank is perfectly entitled to pursue all other properties offered as collateral, including those not offered to realise its debt.

19. In spite of my finding of the above, I will consider one other condition that may prevent me from granting judgment in favour of the claimant. That is, whether the claimant can be compensated in damages.

20. The law of specific performance often necessitates such an examination as it is a discretionary remedy which the courts have determined should be used sparingly and usually only when damages would not be adequate.

21. In this case, the debt owed is for a sum of money. One might quickly conclude that this is easily compensated for in damages. But we have the peculiar situation of a Bank who currently has at large a sum in excess of VT120 million. The defendant is unable to personally meet this debt except through the sale of his properties. The bank therefore can only hope to have the debt satisfied upon a sale.

22. The bank is able to pursue this in one of two ways. The first, as they are doing now, which is to seek to force the defendant to sign outstanding mortgages so that they may proceed to a mortgagee sale within their control, with their security registered to quickly have the debt paid, or, secondly, to prove the debt under a claim action which would then fall to be executed by the court and be outside of the control of the bank, with their security unregistered.

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23. The foreclosure option is a less cumbersome and less expensive option that will allow the bank to satisfy the debt in a timely manner. The second option is traditionally much longer and could very likely lead to a depreciation of the property among other issues over time. The bank has opted for the former.

24. In considering these two options, the bank could realise its debt either way. The disadvantage and prejudice in not granting the remedy they seek is that they could likely lose additional properties as appears to have occurred with the transfer by the defendant of lease titles ending 059 to Luganville Bay at nil costs and lease title ending 007 transferred to Vanuatu Beverage Ltd. The claimant would no doubt be concerned that there was a high degree of probability that the remaining assets of the defendant could be seconded to another use, with the bank losing its priority ranking through the registration of its mortgage documents. If the bank was to lose its security it is unlikely that the defendant would be in a position to repay, from personal funds, such a substantial sum.

25. In the circumstances, I will grant the application of the claimant for summary judgment requesting specific performance of the agreements between the claimant and the defendant.

26. As lease titles 059 and 007 are no longer in the name of the defendant (the first currently being the subject of another claim by NBV Bank for reversal of transfer under section 100 of the Land Leases Act) my order is for specific performance for the leasehold titles ending 026, 061, 002 and 120.

27. Standard costs are made in favour of the claimant in the amount of VT60,000 to be paid within 21 days from date of delivery of judgment.

BY THE COURT

MASTER

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