

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

Civil
Case No. 21/2954 SC/CIVL

BETWEEN: National Bank of Vanuatu Limited
Claimant

**AND: The Estate of late Felix Laumae
Taloiao Kabini**
Defendant

Date of Hearing: 26 January 2022
Before: Justice V.M. Trief
In Attendance: Claimant – Mrs C. Hamer
Defendant – Mr P. Fiuka
Date of Decision: 16 March 2022

JUDGMENT

A. Introduction

1. The Claimant National Bank of Vanuatu Limited (the 'Bank') is seeking mortgagee power of sale orders. This is disputed by the Defendant the Estate of the late Mr Kabini (the 'Estate') on the basis that there was a limited guarantee of VT50,000,000.
2. Having considered counsel's submissions and the evidence, I now set out my decision.

B. Background

3. The Bank is the registered mortgagee, Mr Kabini the mortgagor and Botara Trustees Limited the customer to whose account loan monies were advanced pursuant to a Third Party Mortgage over leasehold title no. 04/3021/1083 (the 'mortgage').
4. Mr Kabini was the registered proprietor of leasehold title no. 04/3021/1083 (the 'lease'). Mr Kabini was the director of Botara Trustees Limited.
5. On 6 May 2020, the Bank issued a formal notice of demand for breaches of the mortgage. The notice was served on Mr Kabini on 3 June 2020.



6. The notice of demand has gone unanswered. As at 24 August 2021, the amount owed was VT169,357,181 with daily interest accruing.
7. Mr Kabini died on 20 June 2020. The transmission of the lease to his wife Viviane Varasmaite was registered on 30 September 2021.

C. Discussion

8. It was suggested that as the administratrix of the Estate, a notice of demand must also be served on Ms Varasmaite. I am not aware of authority for that proposition. The suggestion is rejected.
9. Ms Varasmaite evidenced her belief that Mr Kabini provided a limited guarantee up to VT50,000,000 secured against the lease 'as accepted' through the Bank's letter of offer dated 27 February 2018. That letter was accepted on 2 March 2018.
10. The letter of offer dated 27 February 2018 stated, relevantly, as follows:

The National Bank of Vanuatu Limited (Bank) is pleased to offer the following facility subject to the stated terms and conditions as well as those terms and conditions included in any other documents mentioned herein.

...

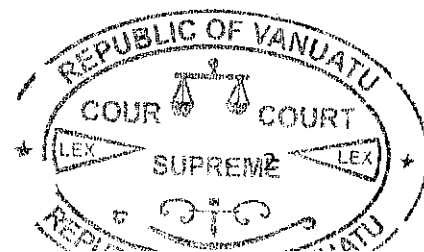
Terms and Conditions are subject to this letter and the Bank's security documents to be executed upon acceptance of this offer.

Security

- ...
- ...
- ...
- ...
- New Guarantee by Felix Laumae Taloinao Kabini limited to VT50,000,000 supported by Registered (3rd Party) Leasehold Mortgage by Felix Laumae Taloinao Kabini over title 04/3021/1083.

(my emphasis)

11. Neither party has been able to put into evidence a copy of a guarantee as referred to that was signed by Mr Kabini. However, the Third Party Mortgage dated 11 April 2018 and registered on 12 June 2018, which was stamped to VT50,000,000.
12. Mr Ben Dick Dali, Recovery Manager of the Bank evidenced in his sworn statement filed on 14 February 2022 that to limit further interest and ongoing legal costs to both parties, the Bank is prepared to accept that the Estate be bound by the Third Party Mortgage up to VT50,000,000 only plus collection costs and interest. Collection costs up to 31 January 2022 totalled VT10,522,921. As at 31 January 2022, the Estate owed VT81,689,158 for the loan facility including interest and penalty interest. The total amount owed therefore, as at 31 January 2022, was VT92,212,079.



D. Result

13. Accordingly, judgment is granted to the Claimant in the following terms:

- a. The Claimant, as Mortgagee, is empowered to sell and transfer the leasehold property contained and described in Leasehold Title No. 04/3021/1083 (the 'Property') by such means and in such manner as it shall deem fit.
- b. Pending such sale and transfer the Claimant, as Mortgagee, or an agent(s) duly authorized by it in writing, is empowered to enter on the Property and act in all respects in the place and on behalf of the proprietor of the lease, and to apply in reduction of the monies due and owing to the Claimant all or any rent received in respect of the Property.
- c. 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:
 - i. Firstly, in payment of the expenses occasioned by the sale and transfer, including receivership costs or going into and remaining in possession (as the case may be), including the costs of this claim;
 - ii. Secondly, in payment of the monies then due and owing to the Claimant as Mortgagee to the amount of VT92,212,079 plus interest and penalty interest accruing collectively at 18.5% from 1 February 2022;
 - iii. Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in order of their priority; and
 - iv. Fourthly, the surplus shall be paid into the Supreme Court Chief Registrar's Trust Account pending further Order of the Supreme Court.
- d. The Defendant is to give possession of the Property to the Claimant forthwith.
- e. The Claimant has leave to apply for an enforcement warrant (non-money order) in respect of the Property.
- f. The Claimant is entitled to costs. The costs are to be agreed between counsel, but if not, taxed by the Master. Once settled, the costs are to be paid within 21 days.

DATED at Port Vila this 16th day of March 2022

BY THE COURT


Justice Viran Molisa Trief

