

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

Civil
Case No. 24/2592 SC/CIVL

**BETWEEN: BANK SOUTH PACIFIC (VANUATU)
LIMITED**
Claimant

AND: MATTHEW ABBOCK
Defendant

Date of Hearing: 9 December 2024
Date of Decision: 10 December 2024
Before: Justice M A MacKenzie
Counsel: Claimant – Mr A Kalmet
Defendant – Mr R Tevi

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

The application

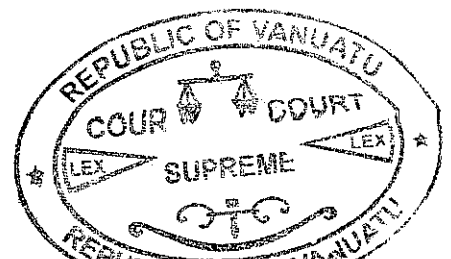
1. This is an application for summary judgment. It is opposed by the Defendant, Mr Abbock, although during the hearing, Mr Tevi conceded that after considering the cases Mr Kalmet referred to, there was no basis to resist an order for summary judgment.

Result

2. After hearing oral argument, I advised counsel that the application for summary judgment was granted, but that the power of sale would be deferred for a period of two months, to enable Mr Abbock time to take steps to refinance or negotiate with the bank.

Relevant background

3. On about 19 May 2008, Westpac agreed to loan Mr Abbock and his wife, Michelle Abbock VT 14,216,000 to assist with the construction of 6 two bedroom units. As security for the loan, Mr Abbock provided a mortgage over leasehold title 11/OA24/061, as he is the registered proprietor of that lease title. It is a term of the mortgage that Mr Abbock would pay all monies secured by and owing under the mortgage upon demand made in writing.



4. Over time, the loan facility was rearranged, and the mortgage varied. Then on 1 July 2026, the mortgage was transferred to Bank of South Pacific.
5. Mr and Mrs Abbock failed to make payments under the loan as required. As a result, notices of demand dated 5 June 2024 were served each of them on 10 June 2024. As at 12 August 2024, the outstanding amount under the mortgage was VT 34,221,454. Since then, Mr Abbock has made additional payments in an effort to clear the arrears. He believes he has paid off 85 percent of the arrears.

Summary Judgment

6. Rule 9.6 of the Civil Procedure Rules 2002 addresses the summary judgment procedure. It is one of the ways provided for in Part 9 of the Civil procedure Rules for ending a proceeding early.

23 Rules 9.6 (7) and 9.6 (9) are applicable and say: -

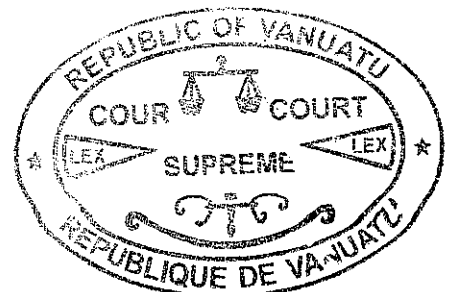
“(7) If a Court is satisfied: -

- (a) The defendant has not 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 that part of the claim, the Court may:*
- (c) Give judgment of the claim or part of the claim; and*
- (d) Make any other orders the Court thinks appropriate.*

.....

(9). The Court must not give judgment against the 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.”

7. Relevant principles include;
 1. The onus is on the Claimant to establish the grounds set out in Rule 9.6(7)(a) and (b); *Sugden v Rolland* [2022] VUSC 145 at 22.
 2. A real prospect means one which is realistic not fanciful; *Swain v Hillman* [2001] 1 All ER 91, approved by the Court of Appeal in *Bokissa Investments Ltd v RACE Services Pty Ltd* (In Liquidation) [2003] VUCA 22.

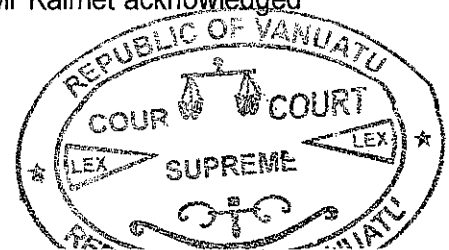


3. The need for caution when considering an application for summary judgment was emphasized in *ANZ Bank (Vanuatu) Ltd v Traverso* [2012]. Sey J said that it is judicially settled that the summary judgment procedure is designed to enable a claimant to obtain swift judgment against a defendant who has no real prospect of defending the claimant's claim. Sey J also sounded a note of caution when Her Ladyship said;

"By its characteristic features, summary judgment as generally viewed is literally shutting the door of justice in the face of a defendant and that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice".

Discussion

8. Under rule 9.6(9), if the Court satisfied that there is a dispute between the parties about a substantial question of fact or a difficult question of law, the Court must not give judgment against the Defendant.
9. Section 59 of the Land Leases Act [CAP 163] provides that the Court may make an order empowering a mortgagee to sell and transfer the mortgaged lease and also to make orders as to how the sale is effected and the proceeds of sale applied. What must be established before an application for summary judgment is granted in a mortgagee power of sale action was confirmed in *Traverso v ANZ Bank (Vanuatu) Limited* [2013] VUCA 8. What must be established is that:
 - i. Mr Abbock has granted a mortgage of his property to the Bank of South Pacific;
 - ii. the mortgage is in default;
 - iii. the notice of demand has been served on the mortgagor;
 - iv. the notice of demand has not been complied with and the mortgage remains in default.
10. During submissions, Mr Tevi acknowledged that:
 - i. Mr Abbock granted a mortgage of his property to the Bank of South Pacific.
 - ii. The mortgage is in default.
 - iii. A notice of demand was served on Mr Abbock.
 - iv. The notice of demand has not been complied with and the mortgage remains in default.
11. A preliminary matter is that Mr Abbock filed an amended defence without seeking the Court's leave as is required under rule 4.11 (2) of the CPR. Mr Kalmet acknowledged



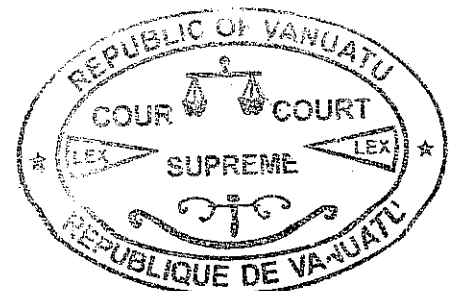
that there was no prejudice to the Claimant, and accordingly I granted leave for the amended defence to be filed.

12. As per the amended notice of defence, Mr Abbock takes issue with the level of repayments, the bank's interest calculations and the amount of the arrears. He does not dispute that the mortgage is and remains in default.
13. He has been making concerted efforts to repay the arrears, but under the First Schedule of the mortgage, clause 1, once demand in writing is made, all monies owing under the mortgage become due. This was the position in *Arnhambat v Bred (Vanuatu) Limited* [2023] VUCA 33. After considering the terms of the mortgage, the Court of Appeal said that once the notice of demand is issued, the whole amount owing under the mortgage became due.
14. Mr Abbock would like the bank to restructure the terms of the loan agreement and mortgage, so that there is a fair resolution. However, it is not a question of commercial fairness or reasonableness. As was said by Tuohy J in *National Bank of Vanuatu v Tambe* [2007] VUSC 105:

*" ... It is not a question of commercial fairness or reasonableness. The Court has no power to depart from the terms of the contract made between the Claimant and Defendant as mortgagee and mortgagor. The Court has no power to do what might be considered "fair and reasonable". If authority for that proposition is needed it is found in decision of **ANZ Bank (Vanuatu) Ltd -v- Lulum** [2000] VUCA 7 CAC 06 of 2000 (27 October 2000)*

15. Mr Nalpini's sworn statement establishes that Mr Abbock granted Westpac Bank a mortgage over lease title 11/OA24/06, which was varied from time to time. On 1 July 2016, the mortgage was transferred to the Bank of South Pacific. Due to a failure to make monthly payments under the loan facilities, a notice of demand dated 5 June 2024 was served on Mr Abbock on 10 June 2024. Mr Nalpini confirms in his sworn statement that as at 12 August 2024, the loan facility stood at VT 34,221,454. The Claimant accepts that Mr Abbock has made additional payments so the loan balance has reduced.
16. While I acknowledge that Mr Abbock raises issues about the amount of the arrears and whether he is paying the correct amount, as noted above, the fact that the amount due is in dispute will not restrain the bank from exercising its power of sale. It is well settled that a mortgagee will not be restrained from exercising a power of sale because the amount due is in dispute.¹

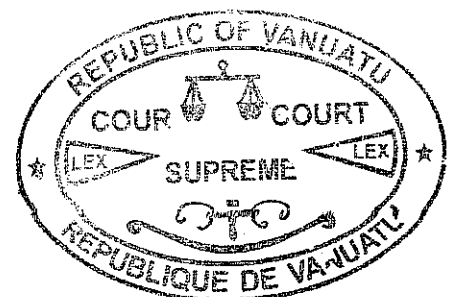
¹ See *Traverso v ANZ Bank (Vanuatu) Limited* [2012] VUSC 222 at paragraph 30



17. There is no dispute that Mr Abbock granted Westpac a mortgage over his property, that the mortgage is in default, that a notice of demand has been served and that the notice of demand has not been complied with and it remains in default. Therefore, the defendant has not real prospect of defending the claim and so there is no need for a trial of the claim. The dispute about the amount of the arrears is not a substantial factual dispute. Therefore, I grant the application for summary judgment.

Orders

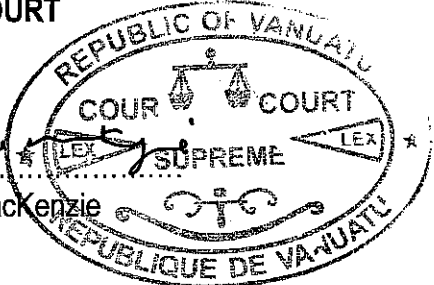
18. The following orders are made.
19. An order that the Claimant, as mortgagee, is empowered to sell and transfer leasehold property contained and described in leasehold Title No. 11/OA24/061 by such means and in such manner as it shall deem fit. The order is to come into effect on 9 February 2025.
20. An order that pending such sale and transfer the Claimant, as mortgagee, or any agent or agents duly authorized 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 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.
21. 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 claim;
 - (b) Secondly, in payment of the monies then due and owing to the Claimant as mortgagee;
 - (c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in order of their priority; and
 - (d) Fourthly, the surplus (if any) shall be paid into this Honourable Court pending further orders.
22. The Defendant give possession of the property to the Claimant as from 9 February 2025.
23. The Claimant has leave to issue an enforcement warrant (non-money order) in respect of the property.



24. The Defendant be ordered to pay the costs of and incidental to the application, as either agreed or taxed.

**DATED at Port Vila this 10th day of December 2024.
BY THE COURT**

man
.....
Justice M A MacKenzie

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central emblem with a scale of justice and a sword. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are positioned on either side of the scale, with "SUPREME" below them. Two small triangles containing the word "LEX" are also present.