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

Civil Case No. 198 of 2014

**BETWEEN: BRED (VANUATU) Ltd**
Claimant

**AND: MATANA INVESTMENTS Ltd**
Defendant

**AND: JAMES ANDREW REILLY and JOHN TIMOTHY SWAN**
Third Parties

***Hearing:*** ***21th August 2015***
***Before:*** ***Justice Chetwynd***
***Counsel:*** ***Mr Hurley for the Claimant***
***Mr Malcolm and Mr Finnigan for the Defendant***
***Mr Thornburgh for the Third Parties***

# JUDGMENT

1. There are two applications before the court. There is an application by the Third Parties to be joined as Defendants and an application by the Claimant for summary judgement. Whilst there are two applications before the court they will, for practical purposes, be intermingled. The Civil Procedure Rules, Rule 3.2(1), provide that the court can order a person to become 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. Rule 9.6 sets out the provisions for an application for summary judgment which can be made if the Claimant believes the Defendant does not have any real prospect of defending the Claimant's claim and allows the court to give judgment for the claim or part of it if it is satisfied there is no real prospect of defending the claim. These applications are further complicated because the applicants for joinder are already Third Parties and there are other proceedings between the Third Parties as claimants and the Defendant and other parties as defendants [1]. Both sets of proceedings deal with a commercial or investment relationship which has clearly broken down but each set of proceedings deals with a discrete issue which has arisen as a result of the breakdown.

2. Civil case 13 of 2014 concerns alleged breaches of contract or agreements between the investors. One possible way of looking at it would be to say it relates to

[1] Civil Case No 13 of 2014

internal disputes, internal to the group of investors. It concerns the damaged commercial investment relationship. This case concerns loans and a mortgage which partly funded the investment project. It involves an external party, the financial institution which provided the loan funds.

3. Whilst looking at the question of whether it is necessary for the Third Parties to be joined as defendants the question of whether there is a real prospect of the defendants successfully defending the claim must be considered as well. The two questions are inter-related. It might be thought the short answer is to consider the summary judgment application first because if the conclusion reached is the present defendant has no real prospect of success there is no need to join anyone else in proceedings which are going to come to an early end. However, that approach ignores the fact that the "new" defendants might very well affect the defence itself, add something to it so that it might be said there is a prospect or chance of the defence or a defence succeeding. In other words, the involvement of the "new" defendants might alter the whole nature of the case. It is necessary therefore to consider both applications together. It is also essential to look beyond the basic facts of the claim and look at all the evidence including all that dealing with the "damaged" commercial investment relationship. That evidence, in this case, comes from sworn statements by Mr Reilly (one dated 24/2/15 and one filed on 21/8/15), a sworn statement by Ms Mahuk dated 24/2/15 and four sworn statements by Mr Hudson (filed on 2/6/14, 10/12/14, 30/6/15 and 20/8/15). It should be noted that the sworn statements set out above as being dated 24th February 2015 were actually created at an earlier date. They were defective and so had to be re-sworn and dated 24th February 2015. In addition there is the Claim, the application for summary judgement, the application for joinder, the proposed defence of the joinder applicants and the third party notice. There were also written submissions.

4. Turning to the facts and looking at the *dramatis personae,* there are 4 main characters or factions. First there is the one faction of investors comprising Mr Michael Thompson and Ms Amanda Laithwaite ("MT & AL"), secondly we have Matana Investments Ltd ("Matana") and thirdly there is the other faction of investors comprising Mr James Andrew Reilly and Mr John Timothy Swan ("JAR & JTS"). Last but not least there is BRED (Vanuatu) Ltd ("BRED") the financial institution. Other incidental characters appear on the stage from time to time and they will be introduced as they appear.

5. Matana is a company which was formed in 2006. On 19th October 2006 Mr Thompson and Ms Laithwaite were named as the directors of the company and Mr Thompson was also named as the Secretary. That remains the position today. Matana was the registered proprietor of a lease of the land upon which is built the Pandanus Bay Apartment complex. The development of that property was the investment project. The original lease was surrendered in August 2007 for the purpose of subdividing the land into strata titles. In November 2009 8 separate strata titles were issued with Matana being the

registered proprietor. There is no dispute the premium paid for the original lease was paid by MT & AL, they bought the land and it was put into the name of Matana, a company which they controlled.

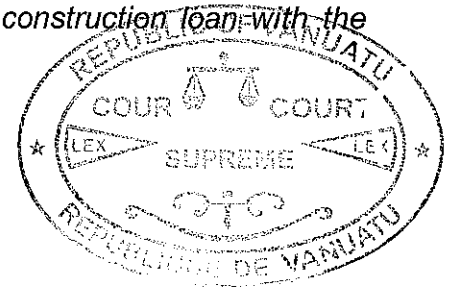
6. JAR & JTS visited Vanuatu in 2006 and were introduced to Mr Thompson. A joint venture was discussed whereby the land would be developed. JAR & JTS returned to Australia and, "*continued discussions ..... and eventually mutually agreed that Michael Thompson and Amanda Laithwaite would supply the land as their investment interest and John Timothy Swan and I would undertake all construction costs*" [2] . Work apparently started on the project in 2007. An incidental character now appears. JAR & JTS arranged for funds to be paid from an Australian dollar account opened up with ANZ (Vanuatu) by them in the name of Commercial Property Investment Group Trust. Not a lot is known about this entity from the evidence. Whatever it is it appears to have been created by and is or was controlled by, JAR & JTS. It seeks to be joined as a party. There is no good reason why it should be joined in these proceedings. Whilst there is evidence money was paid from an account in the name of Commercial Property Investment Group Trust for the purposes of funding construction work it was an arrangement between it and JAR & JTS for their convenience If Commercial Property Investment Group Trust has any remedy then it must be against JAR & JTS. There is absolutely no necessity for Commercial Property Investment Group Trust to be involved in this matter.

7. The only possible reason for this corporate entity being joined as a defendant would be if BRED was pursuing it. The terms and conditions accompanying the offer letters contains a reference to the borrower as a Trustee (clause 16 of the terms and conditions) and remedies available to BRED if that were the case. There is no suggestion BRED is taking that line. The application by Commercial Property Investment Group Trust (or even Commercial Property Investments Group Ltd as it is referred to in the application) to be joined as a defendant in this matter is refused.

8. Yet another incidental character in this discourse appears in the shape of Salt Water Projects. This appears to be a business run by Mr Thompson and was the firm which was engaged to carry out the actual construction work. Nothing much is said about Salt Water Projects and there are no complaints levied against it which affect this claim. It takes no further part in this narrative.

9. From paragraphs 7, 8 9 and 10 of the sworn statement of Mr Reilly (dated 24th February 2015) it can be seen that, from his point of view, the relationship between him and Mr Thompson started to deteriorate at quite an early stage in its existence. A crucial point in the relationship was reached as is set out at paragraph 11 of Mr Reilly's sworn statement. He says, *"We were forced to resort to securing a construction loan with the*

[2] Paragraph 4 sworn statement James Andrew Reilly sworn 24th February 2015



*Claimant in order to complete the project".* No further evidence is introduced to explain this comment and it is not known what forced the issue or why the investors were driven to this conclusion. There is no evidence to suggest that this was not a conscious decision made by the investors of their own free will.

10. What is known is that BRED was approached for financing. There is no dispute that there were negotiations which led to BRED making an offer. I will try very hard not to read anything into it but I cannot help but notice that the offer documentation from BRED dated 3rd October is exhibited to Mr Reilly's sworn statement (as Annexure F), Ms Mahuk's sworn statement of the same date (it appears after Tab f and is called attach 5) and Mr Hudson's statement of 2/6/14 (from page 1 to 9). In the statements supporting the applicants' case all that is exhibited is the first page of the documentation and even that first page (the offer letter) is cut off after the section headed Loan Administration Charge. Mr Hudson's copy is the full 9 page version. It contains ***all*** the details of the loan offer including the acceptances by Matana, MT & AL and JAR & JTS dated 13th October.

11. Another incidental character needs to be introduced at this stage. There appears to be no dispute that a business called Pandanus Bay Apartments was formed by MT & AL to manage any completed units as holiday rentals. Mr Reilly complains that the business did not account to him and Mr Swan for any profits. (See paragraph 23 of his sworn statement). However he does not provide any details as to how the profit and loss statement he refers to was calculated and given that it was produced by his and Mr Swan's accountants (see paragraph 19) that is surprising. All that is said is that the accountants went through the expenses with Ms Laithwaite. It is not known whether MT & AL agreed or agree with the figures provided.

12. Mr Reilly's sworn statement continues to reference his lack of faith in MT & AL's business acumen and on 25th November 2009 a document was drawn up which is referred to as the Heads of Agreement. A copy is annexed to Mr Reilly's sworn statement as annexure J. Mr Reilly then avers that a formal agreement was subsequently drawn up and presented to MT & AL but Mr Thompson refused to sign it as it was not to his advantage. The Heads of Agreement document has an important role in these proceedings, at least according to JAR & JTS.

13. Despite the contretemps about the Heads of Agreement the parties were still talking to one another because they agreed that the loan from BRED be converted to an Australian dollar loan. What led to that conversion or what rational there was for the change is not explained. Mr Reilly's refers to a visit by his and Mr Swan's accountants, Messrs Brierley & Co about a month or so beforehand. Perhaps the arrangement was carried into effect on professional accounting advice. Without any explanation one can only surmise why it was done. The details of Email negotiations leading up to the

conversion are set out in annexure N of Mr Reilly's sworn statement. The formal documentation is set out from pages 20 to 26 of Mr Hudson's annexure JH1.

14. The next significant event is a meeting of the parties in Port Vila in June 2010 some six months later. At that meeting an agreement was reached and the terms were recorded. Transcripts of what transpired at the meeting are exhibited at O1 and O2. The document at O2 is clearly intended to be a formal minute by officers of Matana, MT & AL. It is noted that Mr Reilly and Mr Swam have also signed the document as being present and agreeable. I have been unable to find a clean copy of the document in O1, and so I am not totally clear on what is said to be agreed, in particular what is agreed by paragraph 6. O1 bears no signatures but there is no evidence to show neither MT & AL nor JAR & JTS disagreed to what is set out in the document. In any event steps were taken by all parties to arrange to split the loan and to form a Body Corporate to manage the leases in the strata titles. Annexure Q of Mr Reilly's sworn statement shows some Email correspondence about the split and documentation appears from page 26 onwards in Mr Hudson's JH1.

15. In passing, Mr Reilly raises the question of whether the split was equitable. He says (at paragraph 28) that the Second Defendant, which I believe is a reference to Ms Laithwaite, acknowledges that MT & AL had already received a sum of AUD 47,000 and the split was therefore wrong. The Email referred to is dated August 2013 some ***three years after*** the meeting. What led to the exchange of these Emails is not disclosed and therefore their context is not known.

16. In paragraph 32 of Mr Reilly's sworn statement we are introduced to two more incidental characters Ms Claudine Galibert and Pandanus Waterfront Apartments Ltd. The former is Mr Reilly's co-habitee and nothing more needs to be said about her involvement in this case. The latter is a company which Mr Reilly says was the vehicle to be used for managing units 1, 2, 3, 4, 6 and 8. It is generally accepted that it was agreed in the June 2010 that those units were JAR & JTS's to do with as they wanted. (The other side of the equation was units 5 & 7 were for MT & AL to do with as they wanted). There are further details available from Ms Mahuk's sworn statement about Pandanus Waterfront Apartments Ltd indicating there are two directors, James Reilly and Claudine G Jones. Presumably Ms Jones is the same person as Ms Galibert. These details may be of some relevance because the invoices coming from the Body Corporate are headed Pandanus Waterfront Apartments Ltd (See Mr Reilly's annexures V1 and V2). It raises the question, unanswered in the evidence, as to whether or not Pandanus Waterfront Apartments Ltd is ***the*** Body Corporate.

17. According to Mr Reilly's sworn statement there are arrears owed by MT & AL to the Body Corporate, he says from January 2012 (paragraph 35). He does refer to an Email in March of 2011 from MT & AL when some queries were raised but there is no indication in

any of the evidence to say whether those issues were resolved or not. Similar comments apply to annexure W. There is no evidence the issues raised in the Email exchange set out in annexure W were ever resolved. The evidence suggests that it did precipitate a meeting between MT & AL and Mr Swan. Mr Reilly seeks to introduce details of the meetings which are said to have taken place. He attaches what he calls Minutes of the meeting. He further states they were drawn up by Mr Swan. There is no acknowledgment from MT & AL that the minutes accurately reflect what happened. There is no doubt Mr Reilly wasn't at the meeting. The rule against hearsay applies to written evidence just as it does oral evidence. The minutes cannot be produced as proof of what happened in the meeting by Mr Reilly. Whilst we are on the subject, annexure BB is said to be a transcript of a telephone call between a Ms Leske and Mr Swan. Mr Reilly was not there nor does he say he participated. Annexure BB is hearsay too.

18. There can be no doubt that any working or even neighbourly relationship between Mr Reilly and in particular Mr Thompson had broken down completely by early 2011. In an attempt to resolve the situation a draft Deed (see annexure EE to Mr Reilly's sworn statement) was prepared and sent to MT & AL for them to consider. This appears to be an attempt to put an end to all business relationships between the parties. MT & AL declined to execute the deed.

19. Annexure JJ to Mr Reilly's sworn statement reveals what happened next. There is a series of Emails from BRED to JAR & JTS but copied to other parties as well. The first Email is sent on 24th December 2013. It advised JAR & JTS that their *"portion of the loan payment"* was due. Another Email followed on 6th January 2014 indicating *"your loan payment is 21 days overdue"*. On 9th January BRED wrote *"Loan payment is now 26 days overdue and coming close to the 30 day mark"*. As is made plain by the Email dated 20th January 2014 the trigger for the issue of the notice of demand and the subsequent Claim was the failure of JAR & JTS to pay the proportion of the loan to Matana which they had agreed to and which they had since about August 2010, been paying. To complete the picture, MT & AL continued paying their portion although it does appear payments may have stopped on 15th June 2015. The notice of demand which was issued by BRED is shown at Mr Reilly's annexure LL.

20. The above is the brief potted history of events which led to this case. However the picture cannot be complete without referring to Civil Case 13 of 2014 which was filed on 23rd January 2014 with JAR & JTS as Claimants, Michael Thompson as First Respondent, Amanda Laithwaite as Second Respondent and Matana as Third Respondent. Those proceedings are continuing.

21. In order to reach a decision in this application it is also necessary to look at the proposed defence by JAR & JTS. At paragraph 1 there is a denial but the denial cannot be of any real consequence because surely the proposed defendants are not seriously

disputing the Claimants banking credentials. If they are going to challenge those credentials, to what end and how ?

22. Paragraph 2 is an admission. Nothing more needs to be said about paragraph 2.

23. Paragraph 3 denies the detail of the first loan. That denial flies in face of what is annexed to Mr Hudson's sworn statement filed 2nd June 2014 at pages 1 to 9 of annexure JH1. Part of the front page of the offer is exhibited by Mr Reilly in his sworn statement (see annexure F and what is said in paragraph 10 above). The documents speak for themselves. There was an offer of a facility and it was accepted by MT & AL as the proper officers of Matana, by MT & AL in their personal capacity as sureties or guarantors and by JAR & JTS as sureties or guarantors. It follows a situation which was reached where, according to Mr Reilly, *"We were forced to resort to securing a construction loan with the Claimant in order to complete the project"*. There is clear evidence from Mr Reilly that the parties needed loan finance. BRED made an offer and the terms of the offer are set out in the offer letter. The offer was accepted. Part of the offer required a, "1. Registered first Mortgage over all the Lots in Strata Plan 27 comprising 8 units located at Pango." Also required was, "2. Unlimited guarantees from James Reilly, Tim Swan, Michael Thompson and Amanda Thompson". There has been no suggestion that the last named person was not intended to be Amanda Laithwaite. At pages 1 to 17 of annexure JH2 attached to the sworn statement of James Hudson filed 10th December 2014 is a copy of a Joint and Several Guarantee and Indemnity. It has been signed on 17th October 2008 by James Reilly on his own behalf, by him as attorney under a power of attorney for Tim Swan, and by Michael Thompson and Amanda Laithwaite. To complete the picture there is a copy of a General Power of Attorney dated 11th October 2008 with Tim Swan appointing James Andrew Reilly his attorney at pages 18 and 19 of annexure JH2.

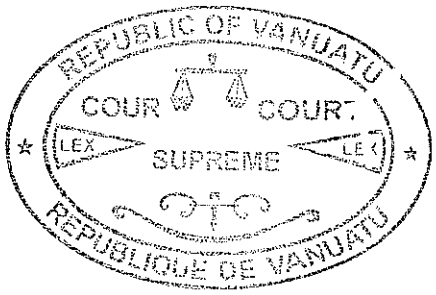
24. Paragraph 4 contains a denial of the "second loan". The details of the loan offer and the acceptance of it appear at pages 10 to 19 of Mr Hudson's annexure JH1. The documents again speak for themselves. In particular page 13 of JH1 consists of a Surety Acknowledgment. JAR & JTS signed the acknowledgement, which reads in part, *"The following sureties acknowledge(s) that the securities given, or to be given by me/us secure all present and future obligations of the customer(s) to the Bank, including obligations in respect of the facilities"*. That has been signed by James Reilly in his own right and by James Reilly for and behalf of Tim Swan. (See paragraph 23 above in relation to the power of attorney.)

25. Paragraph 5 refers to a pre-condition relating to the "Heads of Agreement" signed by MT & AL and JAR & JTS. The arrangement which is set out at paragraphs 7 and 8 of the Claim relates to the conversion of the Vatu loan into an Australian dollar loan. As indicated earlier, no explanation has been proffered as to why the Vatu amount was converted into an AUD amount. What is undeniable though is the amount of money

borrowed did not change, only the currency. The arrangement did not alter the already established liabilities of JAR & JTS as sureties or guarantors in the slightest. It did not increase Matana's liability either. In any event there is not one scintilla of evidence to show that JAR & JTS had made the carrying into effect of the Heads of Agreement a pre-condition to BRED's conversion of the loan. Neither the acceptance of the offer and acknowledgement dated 24th December 2009 signed by the Company (***and*** apparently initialled by both Mr Reilly and Mr Swan), nor the surety acknowledgement dated 24th December and signed by Reilly, Swan, Thompson and Laithwaite individually carries any reference to any pre-condition. There is no evidence to show any pre-condition was put to BRED. BRED may have known about the agreement but that is far from saying that JAR & JTS had made execution of the agreement a precondition of accepting the loan. There is simply no evidence they did that. At the hearing Mr Thornburgh was specifically asked to point out to the court where such evidence was and he was unable to do so.

26. The applicants repeatedly say the Heads of Agreement was putting into effect what was agreed by the parties but that is simply not borne out by their own evidence. Paragraph 4 of Mr Reilly's sworn statement has already been quoted at paragraph 6 above. The agreement to begin with was that JAR & JTS were going to bear the construction costs. Clause 4 of the Heads of Agreement does not provide for that. It provides for entirely the opposite, "*We are not liable for any past debt incurred by Matana Investments Limited*". Clause 5, "*We are not liable for any expenses or guarantees.....*". The formal agreement (annexure K) repeats these provisions at clauses 7 and 8. To begin with, on Mr Reilly's own evidence, Mr Thompson and was not going to be involved in construction costs. By the terms of the Heads of Agreement (and subsequent formal document) debts already incurred by Matana were going to have to be covered by him or rather by the "old" Matana. JAR & JTS also wanted the guarantees they had given to be cancelled in respect of the original loans by Matana. Without any evidence as to how existing debts of Matana were to be covered Mr Thompson was quite right in forming a view that the agreement was not to his advantage.

27. The Heads of Agreement was just one of a series of negotiating stances taken by the disputing parties. This is acknowledged by Mr Reilly in his sworn statement from paragraphs 24 onwards. A new agreement was reached (see paragraph 27) which was entirely different to that set out in the Heads of Agreement and the subsequent proposed formal agreement. There was yet another agreement put forward by JAR & JTS as set out in Mr Reilly' sworn statement at paragraph 47. The covenants set out in the proposed Deed of Resolution bear no real relationship to the proposals supposedly agreed in the Heads of Agreement. It is obvious from the evidence that the "agreements" between the parties were constantly evolving and the parties were not entirely *ad idem* in relation to any of them.



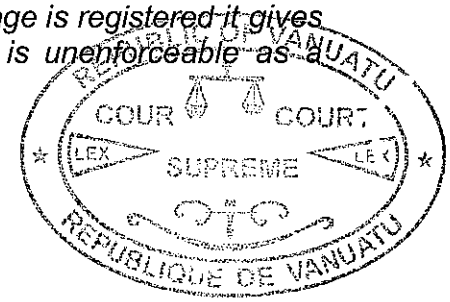
28. It is also obvious from the copies variously exhibited that the Heads of Agreement is dated November 2009. On 19th March 2009 some 7 months earlier BRED made an offer of facilities. There is no suggestion by JAR & JTS that BRED knew of the agreement at that time. There is no evidence it existed or even that it was being considered at that time. There is no suggestion that the formal execution of the Heads of Agreement was a precondition linked to accepting the facility set out in the offer letter. When that offer was accepted (the incontrovertible evidence is that happened on 23rd March 2009) Matana was committed to borrowing Vatu 93,000,000 to be secured by a Registered first mortgage over the Strata Plan 27. What the proposed defendants say at paragraph 4 of their defence has been dealt with at paragraphs 22 and 23 above. In all the circumstances it is difficult to see what arguments are being put forward by JAR & JTS which gainsay the liability of Matana in accordance with the offer. The proposed defence at paragraph 5. e. appears to accept that position. It avers that "*....all obligations remain at the feet of the First Defendant Company.*" Changing the Directors would not remove or diminish the liabilities of Matana. Whilst the Heads of Agreement does seek to rearrange the liabilities, the changes proposed would not have been possible without the agreement of BRED. There is no evidence of any discussions with or proposals put to BRED or any other financial institution to refinance the project and any suggestion that BRED would allow Matana simply to walk away from its commitments is pure fantasy. What Mr Reilly and Mr Swan would have the court believe is that BRED accepted as a pre-condition to giving the "new" Matana the loan set out in the offer letter dated 24th December 2009 that they (BRED) would disregard all loans given to the "old" Matana and cancel all guarantees previously given by Reilly and Swan.

29. Turning now to the remainder of the proposed defence, it seeks to challenge the creation of the mortgage. The simple premise is that the mortgage was created before the creation of the Strata Titles and therefore the registration of the first mortgage was a mistake. The answer to that element of the defence is set out in a judgment by Fatiaki J in the case *of ANZ Bank (Vanuatu) Ltd v Belmonte Investments Ltd* [2015] VUSC 40; Civil Case 243 of 2011 (17 April 2015). His Lordship clearly and succinctly set out the process of creating a mortgage. In particular he says at paragraph 22 of the judgment:

> *"I note as a matter of definition, that the "interest" created by a mortgage as opposed to the lease over which it is created need <u>not</u> be "registered"."*

He later says:

> *"Having said that a combined reading of the provisions of section 22 (2) read with sections 51 and 52(1) of the Act makes it clear that only a "proprietor" of a registered lease can create a mortgage over it <u>and</u> a mortgage is <u>not</u> "completed" until it is registered. In other words unless and until a mortgage is registered it gives rise to contractual obligations and equitable interests but is unenforceable as a security under sections 58 and 59 of the Act"*

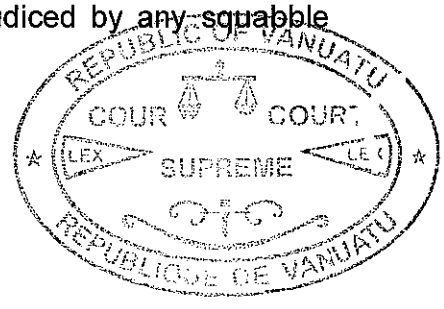


30. In this case the evidence from Mr Reilly (paragraph 16 of his sworn statement) confirms the Strata titles were registered on 30th April 2009. The Variation of Terms of Party Mortgage was, according to Mr Hudson's sworn statement at paragraph 10 (annexure JH1 page 64), registered on 24th June 2009. In the circumstances the mortgage became enforceable as a security under sections 58 and 59 of the Land Lease Act from at least 24th June 2009. Contrary to what the proposed defendants say in the defence, Matana (at all times the registered proprietor of the lease whether it was Title 12/0844/192 or Strata Plan SP 0027) was capable of taking on contractual obligations to create a Registered mortgage. It entered into a contractual relationship with BRED in 2008 to mortgage its property. That created an interest which, as set out by Fatiaki J, did not itself need to be registered. When the Strata Plan Titles were eventually registered so was the mortgage. There was no mistake and no fraud involved. Whilst the initial registration may have been premature, and I make no finding that it was, the mortgage was subsequently registered at a time when the Strata Titles were also registered.

31. Nothing that the proposed defendants have put forward in their proposed defence will affect the outcome of this case. The proposed defence is composed of mainly spurious arguments and some of the evidence put forward to support it is simply duplicitous. Nothing argued changes the fact that Matana granted a mortgage to BRED over property registered in its name. The Mortgage is in default. BRED has issued a notice of demand. The notice of demand has been served on Matana. Since that time the notice of demand has not been complied with and the mortgage remains in default. That was the test set out by Tuohy J in *National Bank of Vanuatu v Tambe* [2007] VUSC 105; Civil Case 237 of 2006 (14 December 2007):

> *5. This Claim is for the exercise of powers of sale by a mortgagee. It is in standard form. What must be established is:*
>
> *i. that the defendant has granted a mortgage of his property to the claimant*
>
> *ii. that the mortgage is in default*
>
> *iii. that notice of demand has been served on the mortgagor*
>
> *iv. that the notice of demand has not been complied with and the mortgage remains in default*

32. In view of all the foregoing there is no reason why it is necessary for James Andrew Reilly and/or Timothy John Swan to be joined as defendants. Quite the contrary, what they seek to introduce in this case are completely unnecessary arguments which have no real basis in fact or law. They can defend the Third Party Claim if it is pursued. In my view the Third Party claim is somewhat misguided because BRED can simply recover the total of the outstanding principal, interest and costs under the mortgage from Matana. When having regard to BRED's rights under the mortgage granted by Matana it matters little who did or did not pay under any agreement or arrangement between JAR & JTS and MT & AL. All that is required to be satisfied are those matters referred to by Tuohy J. Any arguments as between JAR & JTS and MT & AL as to contributions can be and should be addressed in Civil Case 13 of 2014. BRED should not be prejudiced by any squabble amongst the investors.



33. I find that the only proper Defendant in this case, Matana, has no real prospects of defending the Claimant's claim. I find that there is no real need for a trial of the claim. The Claimant is entitled judgment in the terms set out in the Claim filed 2nd June 2014.

34. BRED need to have a free hand to realise their security both under the mortgage and under the Floating Charge (which dates from 2010) over Matana's assets. That means the injunction granted on 21st July 2014 in Civil Case 13 of 2014 by Aru J must be and is hereby discharged in its entirety. In passing it is of concern to me that nowhere in the papers filed by Reilly or Swan in support of the application for the injunction do they say that BRED had issued a notice of demand because of ***their*** failure to make payments as had been agreed between them and Thompson. They must have known that was the case because of the Emails from BRED. (See paragraph 19 above.) The submissions put before the court asserted that the First & Second Respondents (that is Thompson and Laithwaite) are *"dealing with the property in a manner adverse to the Applicants and in a manner which puts the Applicants investment and ownership and property rights in immediate danger"*. There is no reference in their evidence or submissions about their own behaviour. Reilly and Swan, and through them their advisers, must have been well aware at the time the submissions detailed above were made that their own failure to pay what they had agreed to pay in respect of the mortgage had already triggered BRED's initiation of the mortgage recovery procedure. It was their behaviour which was prejudicial to the investment and ownership rights of not only themselves but the other investors too. It is bordering on scandalous that they deliberately omitted to provide that information and had it been put before the court, had they been totally honest with the judge, the result of the application might have been different.

35. The Claimant, BRED, is entitled to the orders set out in paragraphs 1 to 3 of the claim, namely an order for sale (paragraph 1), orders for possession pending sale (paragraph 2) and orders in connection with the distribution of the sale proceeds (paragraphs 3 (A) to (D) . Paragraph 3 (D) shall be amended slightly so that any surplus is paid into court pending judgment in Civil Case 13 of 2014 or further order in this or that case. The Defendant shall be ordered to pay the costs of the suit to the extent it was undefended but the Third Parties shall pay the costs associated with these applications. Those costs shall be paid from the proceeds of sale and shall be deducted from any surplus or portion attributable to the Third Parties.

**DATED at Port Vila this 1st day of September 2015**

**BY THE COURT**

**DAVID CHETWYND**

**Judge**

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU