

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

Civil Case No.240 of 2012

BETWEEN: WESTPAC BANKING CORPORATION
Claimant

AND: FELIX LAUMAE TANOINAO KABINI
Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. G. Blake for the Claimant
Mr. F. Laumae in person

Date of Delivery: 21 August 2015.

JUDGMENT

1. The brief background of dealings between the parties is conveniently summarized in the defendant's sworn statement as follows:

- "(a) I accepted I executed mortgage dated 12 October 2009 with the claimant" (to secure ... the repayment of the said loan advances and the repayment of interest thereon as per Clause 3 of the Mortgage);
- (b) Under the mortgage I give as security my residential property title 12/0631/426 at Bladinière Estate, Airport Area, Port Vila for loan of VT3,500,000 lent to me to pay for my Nissan Patrol in 2009. The property is value at VT15,000,000;
- (c) Subsequently around 2010/2011 I deposited VT5,000,000 as fixed deposit in my personal account number 2000522587 (maintained with Westpac);
- (d) In 2011, I obtained another personal loan to pay for my fishing boat. I used my residential property title 12/0631/426 and the VT5,000,000 as security;"

(my insertions in brackets)

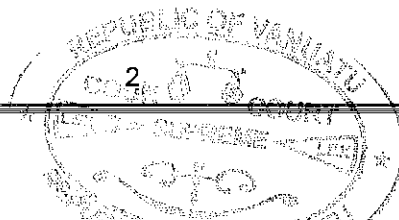
2. Accordingly the defendant had two (2) loan accounts with Westpac and had been making (delayed) repayments towards the loans "until (his) boat sank at Port Vila Harbour which affected (him) financially (as he had) to meet extra costs to salvage (his) fishing boat". The defendant defaulted in his repayments and fell into arrears. At the time of the issuance of Westpac's notice of demand the defendant was "5 months in arrears on both loan facilities". An amount of VT3,712,76 was owing on the defendant's housing loan account and, on the term loan account, the sum was VT4,481,823.



3. By Notice of Demand dated 30 August 2012 Westpac demanded from the defendant:

"... immediate repayment of all the monies due and owing to it secured under the mortgage which as at 20 August 2012 totally (sic) EIGHT MILLION ONE HUNDRED AND NINETY FOUR THOUSAND FIVE HUNDRED NINETY TWO (VT8,194,592) with interest continuing to accrue thereon."

4. On or about 20 September 2012 the defendant met with the officer looking after his bank accounts and instructed her "... to break up my fixed deposit of VT5,000,000 and its interest to clear my arrears and loan". I merely observe that the fixed deposit amount is over VT3 million short of the total amount demanded by the bank in its notice of demand.
5. On 18 December 2012 Westpac issued a Supreme Court claim for, amongst others, an order that it be empowered to sell and transfer the defendant's leasehold title No. 12/0631/426.
6. By para. 17 of the defendant's sworn statement filed on 27 November 2013 he undertook to pay his then housing loan arrears of VT1,360,500 beginning in November 2013 with a view to fully paying-off the arrears by December 2013. To a question from the Court at the hearing of the claimant's summary judgment application on 29 July 2014 (*ie.* 8 months after the undertaking), the defendant frankly admitted that he had not "... paid any money because of (his) financial circumstances".
7. Against the above background the claimant bank (Westpac) seeks summary judgment against the defendant.
8. The application is supported by a sworn statement deposed by a Recovery Officer of Westpac on 25 June 2014 who inter alia deposes:
- That the defendant was lent monies at his request secured by a mortgage over Lease Title No. 12/0631/426;
 - That the defendant defaulted in his repayment under the mortgage;
 - That a notice of demand for VT8,194,592 was issued and served on the defendant on 13th September 2012;
 - That as at 10 June 2014 a sum of Vt4,767,115 remains owing to Westpac; and
 - The deponent also deposes to her belief "*that there is no defence to this action*".



9. It is immediately obvious that since service of the notice of demand, the defendant's liability was almost halved by the time of filing of the claim and the summary judgment application. The sworn statement further confirms that monies in the defendant's fixed deposit held by Westpac had been used at the defendant's instruction to "... pay off part of the total monies owing by the claimant".
10. In his defence the defendant denies owing the VT8,194,598 demanded and says that after being served with the notice of demand he used his fixed deposit in the sum of VT5,000,000 to repay the loan and he asserts that Westpac's claim was "... filed in breach of the terms of the mortgage as no notice of demand was served for repayment of any balance that may be due under the mortgage" nor has Westpac accounted for the amount of interest added to his fixed deposit. In this latter regard the sworn statement in support of the application contains an **annexure "C"** which clearly sets out the various amounts of interest that were credited to the defendant's term deposit and totaling VT118,129. There is no substance in this complaint.
11. In written submissions opposing the application, the defendant clarifies his defence by stating that Westpac had accepted a VT5,000,000 part-payment after service of its notice of demand and, therefore, cannot turn around and claim that he is in "default to pay". More particularly, the defendant writes:

"... since the claimant had accepted the payment of VT4,231,229 from him, the claimant cannot rely on the notice of demand served on the defendant on 30 August 2012 to file the claim in this proceeding against the defendant on basis of waiver".

12. Claimant's counsel rejects the submission in the following terms:

"At the time the Demand was served, the full amount claimed was owed. The monies in the deposit were applied subsequent to the service of the Notice. The Notice required payment in full of the amount specified. When proceedings were issued, the proceedings relied upon the failure to comply with the Demand which required payment in full, which had not occurred. There has been default in respect to the service of the demand and the provisions of the Mortgage addressed the implications of such failure.

Clause 5.13 of the Mortgage provides that the power of sale is not to be prejudiced notwithstanding any previous neglect forbearance or waiver of any rights of the Mortgagee and notwithstanding any negotiations to or between on behalf of the Mortgagor and the Mortgagee subsequent to such default.

The requirements of the Mortgage contract are that if Demand is served and there is a failure to comply with that demand, the Mortgagee may, in accord with the prerequisites provided for in s. 59 of the Land Leases Act, apply to the Court for the exercise of the power of sale are provided for."

13. In ANZ Bank (Vanuatu) Ltd. v. Lulum [2000] VUCA 7 the Court of Appeal in upholding the bank's appeal against a refusal to grant the bank's application to enforce its mortgage, outlined the "pre-conditions" to the exercise of a mortgagee's power of sale when it said:

"... the so-called pre conditions for the exercise of a mortgagee's power of sale have been established, namely, (1) that a default has occurred on the part of the mortgagor in meeting his repayment obligations under the mortgage agreement; (2) that a NOTICE OF DEMAND has been served on the mortgagor requiring payment of the amount due under the mortgage, and finally, (3) that the mortgagor failed to comply with the notice in the time given".

(my bold numbering)

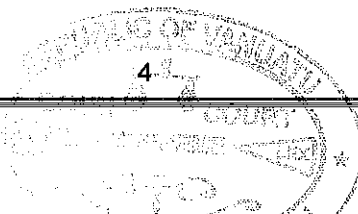
14. In the present case I am satisfied that pre-conditions (1) and (2) are established, indeed, the same are conceded by the defendant. Condition (3) is vigorously denied however, on the basis that a part-payment was made and accepted by Westpac after service of the notice of demand and, therefore, no reliance could be placed on the notice of demand as it had been effectively "waived" by Westpac accepting a part of the demanded amount. I cannot agree.

15. In ANZ Bank (Vanuatu) Ltd. v. Dinh [2005] VUCA 3 the Court of Appeal in upholding the bank's appeal and reinstating a default judgment entered in its favour, said when considering whether there was any arguable issue about the quantum of interest:

"Where a Defendant seeks to establish an arguable question to avoid a summary judgment, or to demonstrate an arguable defence for the purpose of setting aside a default judgment, it is not sufficient for the Defendant merely to raise a general assertion that the claim might not be correct. The Defendant must give particulars sufficient to show that there is real substance to the argument. In a case like this, where the argument, if it had substance, would go only to a small part of the claim, the particulars given must also indicate which parts of the claim are open to possible question, and which parts are not affected. This is necessary so that judgment can be entered for that part of the claim which is not the subject of dispute."

16. Somewhat similarly in the present case, the defendant has no-where directly pleaded a "waiver" in his defence or mentioned it in his sworn statement and, although it is a significant element of the defendant's written submissions opposing the application, and raising what is claimed to be a "substantial dispute" over Westpac's assertion that the defendant "... refused and/or failed" to pay on the notice of demand, again, I cannot agree.

17. In the first place, Clause 3 of the mortgage clearly states that it is given:



"To secure to the Mortgagee the repayment of the said loan/advances and the repayment of interest thereon in the manner and at the rate set out in the First Schedule hereto ..."

And **Clause 2.1** of the First Schedule provides that:

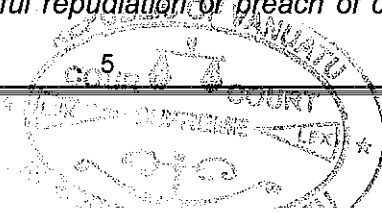
"The Mortgagor will pay to the Mortgagee the moneys hereby secured by the due dates for payment thereof. Where there is no agreed date or time for payment of such amount, the same shall be payable by the Mortgagor to the Mortgagee on demand".

And the expression "**the monies hereby secured**" includes:

"(a) all monies now or hereafter actually or contingently due, owing or payable to the Mortgagee by the Mortgagor ... on any account whatsoever and whether as principal or surety".

18. Secondly, the notice of demand in very clear terms demands the "... **immediate repayment of all the monies due or owing to it** (as) **secured under the mortgage**" which, as at 20 August 2012, was a sum of VT8,194,592. The demand is not one which seeks payment of outstanding principal or interest only or a partial payment nor does it envisage further negotiations of repayment terms.
19. In simple terms, the only payment which would satisfy the notice of demand is an "**immediate**" payment of the full amount demanded, namely, VT8,194,592. Accordingly, the defendant's partial payment of VT4,231,129 does not constitute compliance with the clear terms of the notice of demand nor, in my view, is any "**substantial question of fact**" raised by Westpac's acceptance of the partial payment.
20. Thirdly, the use, without elaboration, of the word: "**waiver**" by the defendant in his written submissions is both misconceived and confusing. As Lord Diplock explains the meaning of the term in the following extract taken from Kamins Ballroom Co. Ltd. v. Zenith Investments (Torquay) Ltd. [1970] 2 All ER 871 at p. 894 HL:

"Waiver is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which gave rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is




better categorized as 'election' rather than as 'waiver' ... the second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be stopped from raising it".

21. In the present case the raising and service of the notice of demand is the clearest indication that Westpac, far from abandoning its contractual right to issue a "demand" under Clause 2.1 of the mortgage, has clearly elected to pursue its rights under it rather than the inconsistent alternative of allowing the defendant more time. Accordingly no question of "waiver" can be said to arise either on or after the issuance of the notice of demand.
22. As for the subsequent tendering and acceptance of a lesser sum than that demanded in the notice of demand, that does not constitute a "waiver" of the notice of demand as the defendant submits, rather, in my view, the short payment constitutes an act of "default" by the defendant in terms of Clauses 5.2 and 5.4 of the First Schedule sufficient to enliven Westpac's right to fully exercise its contractual power of sale by issuing proceedings in the Supreme Court pursuant to Section 59 of the Land Leases Act [CAP. 163].
23. In light of the foregoing the application for summary judgment is granted and there will be orders in terms of paras. (1), (2) and (3) of the claim. The claimant is also awarded costs of the application to be taxed if not agreed.

DATED at Port Vila, this 21st day of August, 2015.

BY THE COURT


D. V. FATIAKI
Judge.

