

BETWEEN: NATIONAL BANK OF VANUATU
Appellant

**AND: ANNIS ANNA SAVUAI AND PETER SALI
SAVUAI**
Respondents

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice James Geoghegan*

Counsel: *Mr. N Morrison for the Appellant
Mr Peter Sali Savuai in Person*

Date of Hearing: 12 July 2017

Date of Judgment: 21 July 2017

JUDGMENT

1. This is an appeal against the decision of the Supreme Court dated 31st March 2017 which concerns mortgage financing between the respondents ("Mr and Mrs Savuai"), the Vanuatu National Provident Fund ("VNPF") and the appellants, the National Bank of Vanuatu ("NBV"). For reasons which shall become obvious, VNPF are not parties to this appeal and indeed, were not a party in the court below. In the judgment under appeal the Judge dismissed the claim by NBV against Mr and Mrs Savuai for sale of their property pursuant to the terms of a mortgage and in accordance with section 59 of the Land Leases Act [Cap 163].



2. In the judgment appealed the Judge set out a Background and Chronology. In brief, on 12th March 1996 Mr and Mrs Savuai entered into an agreement ("the original agreement") with VNPF. The agreement was for a loan of VT 4,967,600 to enable Mr and Mrs Savuai to purchase a property. The loan was over a period of 15 years with interest initially being payable at 7.5% per annum (although it should be noted the interest rate was, "...reviewable at the discretion of the Fund" that is VNPF). According to the written agreement the loan was to be secured by a first mortgage over the property to be purchased. On 10th April 1996 leasehold title 11/OX21/045 was transferred to Mr and Mrs Savuai.

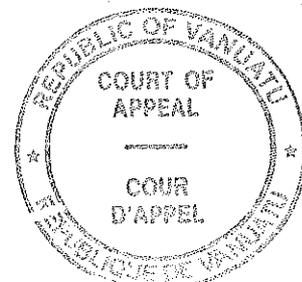
3. As part of their defence in the Supreme Court Mr and Mrs Savuai denied signing any mortgage deed. However, the Judge in the court below noted,

"...the second named defendant (Mr Savuai) admitted under cross-examination that he knew a mortgage was the required security for the VNPF loan and that a mortgage was in fact given and registered on the defendants' leasehold title No.11/OX21/045."

The mortgage deed was signed on 6th June 1996 and registered on 27th May 1998.

4. The mortgage was described by the Judge as an "*on demand*" mortgage. The First Schedule to the Mortgage contains a covenant by Mr and Mrs Savuai to, "*on demand in writing*" pay or discharge all sums of money due or owing to the Mortgagee (at this time VNPF) by Mr and Mrs Savuai as Mortgagor. In practical terms it meant the Mortgagee could make a demand in writing to Mr and Mrs Savuai who would then be bound to repay all of what was said to be owing under the mortgage. That right could be enforced by application to the Supreme Court in accordance with section 59 of the Land Leases Act [Cap 163].

5. The original agreement was varied on 28th May 1997. The only change was to the amount borrowed which was increased to VT 5,884,598. The agreement, as varied, was "*to be construed as forming part*" of the original



agreement and contained an express provision preserving all the, "rights, privileges, claims, interests, or security" in the original agreement.

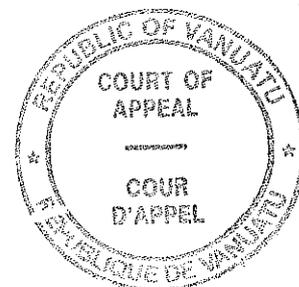
6. On 6th July 2001 VNPF transferred the mortgage to NBV. The consideration for the transfer was VT 5,825,551. The mortgage transferred was identified as being that shown in entry number 3 in the encumbrances section of the register in respect of the Lease of the land comprised in title number 11/OX21/045. That was a reference to the mortgage dated 6th June 1996 between Mr and Mrs Savuai and VNPF. The transfer document contains a declaration by VNPF that the amount of principal and interest owing by Mr and Mrs Savuai at that time was VT 5,825,551. The transfer was registered on 29th September 2004.

7. The Judge in the Supreme Court referred to this transfer and (at paragraph 33) says:-

"As for the legality of the transfer of the defendants' VNPF loan account and mortgage to NBV, the defendants aver that such a transfer is not sanctioned under the AMU Act and is therefore illegal. This particular averment is not denied in any reply filed by NBV and therefore, notwithstanding Rule 4.6 which relates only to facts, may be taken to be admitted, but, even if denied, in my view, the defence is unassailable".

It is clear from this passage that the Judge accepted the claim by Mr and Mrs Savuai that the AMU Act prevented the transfer of the mortgage from VNPF to NBV. The Judge comments that NBV had not challenged that claim but even if it had the averment set up a defence by Mr and Mrs Savuai which was "unassailable".

8. The AMU Act referred to is the Asset Management Unit Act No. 22 of 1998. How that Act came into being is described by the Judge in his Background and Chronology. The Act seems to have been precipitated by civil unrest and a riot in January 1998 which was caused by public concern about the



politicisation of VNPF Members Housing Loan Scheme and concern for the safety of funds paid into the VNPF. The purpose of the Act was :-

“(to) provide for the restitution of the National and Development Banks of Vanuatu and for the transfer of certain asset and liabilities from the Vanuatu National Provident Fund to the Asset Management Unit” (the “AMU Act”)”

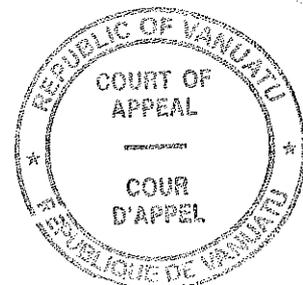
9. The Judge refers to letters from the Minister of Finance and Economic Management and the Minister of Lands and Natural Resources to determine the operation of the AMU Act. The Judge found that one of the effects of the AMU Act was to render transfers of mortgages from VNPF to NBV as illegal. This was apparently on the basis that the Ministers were concerned that transferred mortgages attracted higher rates of interest, the rate generally increasing from 7.5% to 12% per annum. Unfortunately the Ministers and the Judge overlooked the wording of the original agreement which at clause 7 refers only to an *“Initial Rate of Interest”* (of 7.5%) and at clause 10(2) contains a proviso that interest rates were *“...reviewable at the discretion of the Fund”*. The rate of interest could have changed at any time and was not fixed at the initial rate. There was no provision in the original agreement or the VNPF Mortgage fixing the rate of interest for the term of the mortgage, quite the contrary.
10. After consideration of the Act as a whole the Judge concluded:-

“(1) Not every asset and liability held by VNPF is to be transferred or divested;

(2) Every asset and liability of the VNPF that is divested or transferred has to be selected or “nominated”; and

(3) the divested asset and liability will be transferred “to AMU” only.”

In addition, the Judge found when there was a transfer another provision in the AMU Act was applicable and he said:-



"Furthermore in terms of subsection (2), with any transferred asset or liability:

"... there shall be an agreement between the parties concerned as to the purchase price and for the terms and method of payment"

The Judge was satisfied that Mr and Mrs Savuai had never agreed to the transfer. The Judge's conclusion was that those provisions in the AMU Act prohibited the transfer of the mortgage from VNPF to NBV.

11. We do not agree with the judge. The AMU Act permitted, *"the transfer of certain asset and liabilities from the Vanuatu National Provident Fund to the Asset Management Unit"*. It did not make transfers mandatory. It did not prohibit or inhibit the provisions in the Land Leases Act for the transfer of registered interests. They are set out in Part 9 of the Land Leases Act :-

60. Transfer

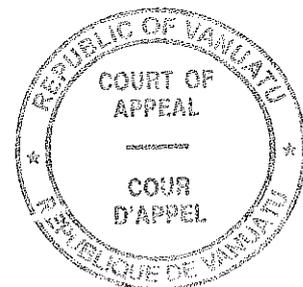
(1) A proprietor may, subject to the provisions of this Act, transfer his registered lease or mortgage to any person, with or without consideration, by an instrument in the prescribed form.

(2) The transfer shall be completed by registration of the transferee as proprietor of the lease or mortgage and by filing the instrument.

(3) A transfer shall dispose of the registered lease or mortgage transferred for the whole remaining portion (at the time when the disposition purports to take effect) of the period for which the lease or mortgage was registered.

The only restrictions on transfers are as set out in section 61:-

61. Restriction on transfer



- (1) *A transfer shall not be expressed to take effect on the happening of any event or on the fulfilment of any condition or at any future time.*
- (2) *Any condition or limitation purporting to restrain absolutely a transferee or any person claiming under him from disposing of the interest transferred shall be void.*
- (3) *A proprietor of a registered interest may not dispose of the interest for the whole remaining portion (at the time when the disposition purports to take effect) of the period for which the interest was registered, otherwise than by way of transfer in accordance with the provisions of this Act.*

These provisions make no mention of the consent of a mortgagor to a transfer.

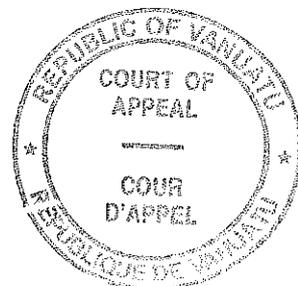
13. There are other specific provisions in respect of the transfer of mortgages but they too do not relate to obtaining a mortgagor's consent:-

63. Entitlement of a transferee of a mortgage

Upon registration of a transfer of a mortgage, the transferee shall be entitled to all of the rights, powers and remedies of the mortgagee expressed or implied in the mortgage including the right to recover any debt, sum of money or damages thereunder; and all the interest of the transferor in any such debt, sum of money or damages, shall vest in the transferee.

It is clear from section 63 that a transferee has all the rights, powers and remedies of the original mortgagee. The transferee stands in the shoes of the transferor in respect of all those matters.

14. The next section states:-

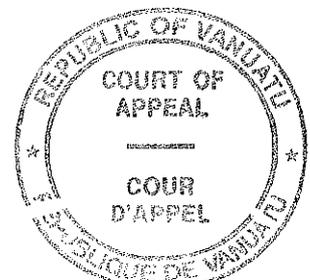


64. Registration of transfer of mortgage

A mortgagor shall not be bound to account to any person who has acquired an interest in the mortgage unless the instrument whereby such person became entitled has been registered and the mortgagor has been notified in writing of the registration by such person.

It is clear from this section that registration of the transfer and notification of the transfer to any mortgagor are essential precursors to **enforcing** any mortgage. However, there is no requirement for the transferee to obtain the consent of a mortgagor to any transfer or for the mortgagor to be involved in any way in the process or procedures of transfer.

15. There was unequivocal evidence before the Supreme Court that the transfer had been registered (on 29th September 2004) and that NBV had notified Mr and Mrs Savuai of the transfer (see for example annexure E to the sworn statement of Peter Sali Savuai dated 26th February 2010). There is no doubt that Mr and Mrs Savuai, as mortgagors, had been notified of the transfer to NBV as early as September 2002. NBV were therefore entitled to enforce the mortgage in accordance with section 59 of the Land Leases Act.
16. This was a straightforward commercial transaction between VNPF and NBV. The AMU Act has no bearing on that transaction and can have absolutely no effect on the legality of what is permitted by Part 9 of the Land Leases Act. The Judge in the court below erred in finding the transfer of the mortgage was illegal and his finding in that regard must be set aside.
17. There was some discussion before us about the amount paid by Mr and Mrs Savuai. It was said by them that amount they had borrowed had been repaid. It is entirely possible that a sum of money equal to the amount originally borrowed has been paid. However that does not answer the claim that Mr and Mrs Savuai have not repaid all that was owed by them under the mortgage. They are required to pay not only the principal amount but



interest and other charges as well. Mr Savuai was perfectly frank with us and said he had ceased payments probably as early as 2009. There were undoubtedly arrears under the mortgage deed and the written demand in July 2008 indicated the sum owed was VT 7,035,848. Further charges have accrued since then but it was not necessary to investigate further as NBV has conceded that if there is an underpayment upon sale they will not seek to recover it from Mr and Mrs Savuai.

18. The appeal is allowed and the decision of the Supreme Court dated 31st March 2017 is quashed.
19. Judgment is entered for the Appellant and an order made for the possession and sale of Leasehold Title 11/OX21/045. There is no need to make a formal order for costs because the Mortgage of 6th June 1996 provides for the recovery of all reasonable legal costs in relation to the establishment, maintenance and enforcement of the security.

DATED at Port Vila this 21st day of July, 2017

BY THE COURT



**Hon. Vincent LUNABEK
Chief Justice.**

