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

Civil Case No. 10/148 SC/CIVL

BETWEEN: **SANDRINO TRAVERSO**
First Claimant/First Counter Defendant

AND: **ENTREPRISE S. TRAVERSO**
Second Claimant

AND: **M. LYDIE MARA**
Second Counter Defendant

AND: **ATOM LIMITED**
Proposed Third Counter Defendant

AND: **VECA LIMITED**
Proposed Fourth Counter Defendant

AND: **REPUBLIC OF VANUATU**
Proposed Fifth Counter Defendant

AND: **ANZ BANK (VANUATU) LIMITED**
Defendant

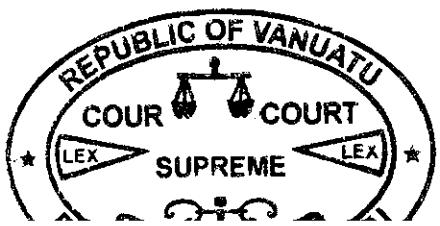
Coram: ***Justice D.V. Fatiaki***

Counsels: ***Dane Thornburgh for the Claimants***
Mark J. Hurley for ANZ.
Sammy Aron for Republic of Vanuatu

JUDGMENT OF THE COURT

Introduction, Background & Pleadings

1. This case concerns the breakdown of a long-standing business relationship between ANZ and the claimants. More particularly, after the claimants' original claim was struck out, the case continued with ANZ's counterclaim in which it sought to exercise its mortgagee rights to recover monies loaned to the claimants. Towards that end, ANZ seeks rectification and mandatory orders against the counter-



defendants in order to achieve the completion of its interest over the three (3) plots of land which were formerly owned by Sandrino Traverso, and, over which ANZ asserts an unregistered collateral mortgage was knowingly executed by him.

2. For convenience and continuity, I adopt the background outlined in Traverso v Republic of Vanuatu [2016] VUCA 51 where the Court of Appeal upheld the striking out of Traverso's original claim against ANZ by the Supreme Court and said, inter alia at paras 2 to 6:

> *"... At its inception the only named claimants in (*the present claim*) were ...* (Mr Traverso*) and ... Enterprise S Traverso which is a business name under which Mr Traverso trades. Further, at its inception the only defendant was the Bank. Over the years other parties have been added to the proceedings as defendants to a counterclaim filed by the Bank ...*
>
> *The background to this long running dispute between (*Traverso*) and the Bank is as follows. Mr Traverso has been a longtime customer of the Bank both in his personal and business respects. Progressively between 28th April 2006 and 4th June 2008, Mr Traverso ... accepted six loan facilities offered after negotiation by the Bank covering both personal, home, and business accounts. The last facility granted on 4th June 2008 was for a facility of VT139,981,206. Interest payable on the various accounts within the facility were stated in the loan offer to be 8.25% on personal loans and 9.5% on business loans.*
>
> *As a result of the 2008 Global Financial Crisis Mr Traverso and his business encountered financial difficulties and he failed to adhere to the conditions of the loans as to repayment. The Bank applied higher penalty interest rates to the accounts. By mid-2009 the interest rates on personal loans had risen to 13.5% and on business related loans to between 18.05% and 18.85%.*
>
> *Mr Traverso protested the level of interest being charged. On 27th September 2010 he commenced (*the present Action*) pleading that the agreement he had with the Bank and its French predecessors was that he would be charged a maximum of 10% interest, and that his loans were governed by French law that prohibited capitalized interest and usurious rates of interest. The relief claimed included the following orders:*
>
> *a) An order for the defendant to apply the agreed interest of 10% per annum on the loans contracted by the claimants;*
>
> *b) An order for the defendant to disclose the figures applying the agreed interest;*
>
> *c) An order restraining the defendant to further charge the claimant with usurious interest after the filing and service of the ... claim;*
>
> *d) An order for the claimants to immediately pay and so , to settle their debt with the defendant as soon as the correct figures taking into account the agreed interest of 10% will be provided by the defendant and agreed by the court or agreed by consent of the parties;*
>
> *e) Just compensation for the damages resulting of the defendant's abuse of dominant position and blatant dishonesty ...."*

The Bank denied the claims and pleaded that the terms of the loans and interest rates being charged by it were agreed in the documentation on which the Bank relied. By way of counterclaim the Bank sought payment of the outstanding loans and an order requiring the claimants to execute mortgages over three (3) land titles which the Bank alleged had been offered as collateral security to a principal mortgage already held by the Bank. The claimants in their defence to the counterclaim denied that collateral security had been offered over the three titles. The counterclaim has since been amended to add additional parties to whom the Bank alleges the three titles have been fraudulently transferred by the claimants to defeat the Banks collateral security. The Republic has also been joined as a party, ...".

3. In dismissing the claimants' appeal, the Court of Appeal also made reference to an item of *"new evidence"* that the claimants sought to lead in the appeal, in the following relevant terms at paragraph 28:

> *" ... In a sworn statement Mr Traverso says that following Cyclone Pam his workshop and pertinent documents were destroyed but in early September 2016 he discovered the copy of the letter of offer dated 4th June 2008 in another location. The copy letter is said to be inconsistent with the facility offer dated 4th June 2008 relied on by the Bank in support of its counterclaim in respect of collateral security .... At the most the letter relates to issues raised in the counterclaim concerning collateral security and those issues were not affected by the claim being struck out ... it can still be raised in the trial of the counterclaim ..."*

(***see also***: the judgment of the Court of Appeal in **[2013] VUCA 8** esp. at paras 2 to 11 and paras 22 to 27).

4. At this juncture it may be recorded that my employment with the Supreme Court of Vanuatu came to an end in September 2019 and before closing submissions could be filed soon after I finished hearing the case. Thereafter, I began hearing a criminal case in the Supreme of Nauru in October 2019 until December. The case files in this case numbering hundreds of pages, did not arrive in Fiji until the middle of 2020. Some of the delay was also the result of delays in the production of typed transcripts of audio recordings of the trial evidence and then, accommodating various extension requests from the parties, which were necessitated, because through no fault of theirs, the claimants suffered the misfortune of losing the services of their counsel after the trial had ended, but before closing submissions could be filed. I acknowledge the personal efforts made by Mr Sandrino Traverso in filing their closing submissions in late March 2020 which I have found of assistance.

5. I was also stranded on Nauru during the whole of 2021 owing to COVID lock-downs and was only able to access the present case files on my return to Fiji in 2022. I then completed a draft of the judgment dealing with the claimants' principal claims against the Bank which was then sent to my former secretary/associate in Port Vila for transcribing and formatting. The draft judgment was returned to me on 31 May 2022, and remained in that incomplete state for 2 years until it was finished.

6. In this judgment, for ease of reference, the parties will continue to be referred to in their original capacities, namely, Sandrino Traverso and Enterprise Traverso as "*the claimants*" and ANZ Bank

as *"the Bank"*, even though the Bank's counterclaim necessarily reverses their roles. Be that as it may, the claimants' Defence to the Bank's Amended Counterclaim filed on 10 February 2017 avers inter alia, that the Bank was fraudulent in its dealings with the claimants including in "... *its Letter of Offer and subsequent documentation dated 4 June 2008 ...*".

7. The claimants also deny that the Bank charged the correct interest rates and indeed, they claim that the various interest rates charged by the Bank, were contrary to the contractually agreed rate. The charged interest rates also breached the mandatory provisions of Section 56(2) of the Land Leases Act which states:

> *"A mortgage may provide for the payment of interest at a higher rate than that appointed if the interest at the appointed rate is not paid within a specified period after the same shall have become due, but so that the higher rate shall not exceed the appointed rate by more than 3 per centum per annum".*

The sub-section whilst recognizing the validity of what is commonly referred to as *"an acceleration clause"*, nevertheless, imposes a maximum above which, the accelerated interest rate may not exceed (**ie.** the "***appointed rate***" **+ 3%** per annum).

Accordingly, the claimants deny being *"in default"* at the time the Bank made its demands for repayment of the loan facilities.

8. Specifically, in their Defence and Counterclaim the claimants seek:

a) *A Declaration that at the time of the Default Notices as issued by ANZ and relied on for the enforcement of the mortgage, that they were not in default;*

b) *An Order that the interest as charged and applied to (the claimant's) facilities were adverse to s.59* (sic) *of the Land Leases act;*

c) *An Order that ANZ adjust the balances to reflect an interest rate of no higher than as contractually agreed in the Letter of Offer of 6* (sic) *June 2008 of 13%;*

d) *That ANZ account to the claimants for monies had and received as a result of the breach of contract by way of interest charged over and above the agreed Letter of Offer and the breach of s.56(2) Land Leases Act.".*

The claimants also seek damages of *"... not less than 150,000,000VT* ***(ONE HUNDRED AND FIFTY MILLION VATU)***".

Sworn Statements & Trial Evidence

9. **For the Bank**

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

(i) Oliver Weber – Manager Corporate Services AJC Chartered Accountants. He produced two (2) Office files on ATOM Limited and VECA Limited as **Exhibits C(1) & (2)**, respectively;

(ii) Martin St. Hilaire – Principal of AJC Chartered Accountants. He spoke on the contents of the above-mentioned Office Files. He described how the companies were pre-existing "*shelf-companys*" for which there was filed, in respect of each company, a Declaration of Trust in which his firm was the appointed Trustee. In the Veca trust Mr Sandrino Traverso, his partner, and their children were the beneficiaries;

(iii) Christopher Michael Shallvey – Head of Risks, ANZ Vanuatu, from 2 January, 2008 to 6 January, 2011 who produced a sworn statement dated 19 December, 2017 **[Exhibit C (3)]**. He dealt with the claimants' accounts at a later stage. Without denying the authenticity of the claimants' version of the Bank's disputed Letter of Offer of 4 June, 2008, he nevertheless deposes inter alia:

> *"... At all times during my employment with ANZ Vanuatu it was my understanding and belief based on the letters of offer signed by Mr Traverso (**not** by David Schwenke) ... that the security required by (sic) Mr Traverso in support of his loan facilities included a collateral mortgage over title nos. 12/0912/018, 12/0912/020, and 12/0912/022 being Mr Traverso's titles at Bellevue (**the Bellevue titles**).*
>
> *... If Mr Traverso had requested the deletion of the Bellevue titles as part of the securities referred to in the letter of offer that he had signed on 4 June, 2008 it would have been necessary for David Schwenke ... to whom he made such request to obtain my approval. No such approval was ever sought or given by me.*
>
> *.... At no time during my employment with ANZ Vanuatu did Mr Traverso, Mr Schwenke or anyone else ever suggest to me that ANZ Vanuatu had agreed not to take mortgage security over the Bellevue titles ..."*

In cross-examination, Mr Shallvey frankly admitted however, that David Schwenke was the bank officer directly dealing with Sandrino Traverso's accounts at the relevant time, and, in particular, in the compilation of the contents of the disputed Letter of Offer of 4 June, 2008. He was unaware of any particular alterations sought by Mr Traverso in the said letter, and he agreed that the removal of a collateral mortgage was a "*substantial change*" which would necessitate the re-issuance of the affected Offer letter. This is later confirmed in the cross-examination of Santos Vatoko who was Mr Schwenke's assistant at the relevant time.

During Mr Shallvey's evidence, a letter dated 16 January, 2009 from George Vasaris & Co. to Mr Santos Vatoko of ANZ concerning the security documentation for Mr Sandrino Traverso accounts was marked **[Exhibit C (4)]** by consent of counsels;

(iv) Dudley Wai – a former employee of the Bank between 2009 and October, 2011. He was an *"in-house"* Commissioner for Oaths of ANZ, Vanuatu, from 2010 and a signatory to various ANZ security documents, including mortgages. He deposed a rather unhelpful sworn statement dated 16 February, 2018 **[Exhibit C (5)]** in which after sighting the relevant Mortgage document, he identifies his signature *"....as the person who signed as the witness to Mr Traverso's signature on page 10 of the Mortgage"* which included the three (3) disputed Bellevue titles.

Unfortunately, in the very next paragraph, he deposed that he "... (had) ... *no specific recollection of witnessing Mr Traverso's signature on page 10 of the said mortgage*". Even accepting the passage of time, a cursory examination of the relevant signature page clearly shows that the person who witnessed Mr Traverso's signature is: ***"Beatrice Rolland"***, not the deponent who is clearly recorded as having signed the mortgage in his capacity as the certifying officer who personally knew Sandrino Traverso who had appeared before him and signed the document.

The deposed mis-description of Dudley Wai's capacity in signing the disputed mortgage document may appear innocent enough at first blush, but, when considered against his witnessing and certification of the Bank's Attorney Marilyn Kalangis' signature without the involvement of a third person, lends support in my view, for the claimant's evidence as to the circumstances surrounding the signing of the disputed collateral mortgage document. Mr Dudley Wai was even more unhelpful in cross-examination;

(v) Santos Vatoko – a former ANZ Bank Officer between 6 January, 2000 and 16 November, 2011 and assistant to Mr Schwenke in the Corporate Services section. In cross-examination, he agreed that to his understanding, the "*appointed interest rate*" referred to in Section 56(2) of the Land Leases Act is the interest rate(s) offered to a client as enumerated in the Bank's Letter of Offer.

He agreed that the Bank's primary security for the claimants' loans was its factory building at Champagne Estate valued by **CK Real Estate** at VT152 million, which figure fully secured the Bank in June 2008 when the disputed Offer letter of 4 June, 2008 was under discussion. Although unsure of what amendments were made or requested by Mr Sandrino Traverso in the disputed Offer letter, he agreed that deleting a security was a *"material change"* which, if approved, would result in the preparation and re-issuance of a fresh Offer letter omitting the deletion.

He agreed it was the Bank's responsibility to arrange for the execution of its security documents and that, the signing of mortgage documents varies for Bank customers. He agreed sometimes, clients signed mortgages in the absence of a Commissioner of Oaths.

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX

(vi) Elizabeth David – Asset Management Officer between 2002 and 2010. Manager Asset Management Unit, ANZ Vanuatu from March 2010 until January, 2014. She deposed three (3) sworn statements [**Exhibits C - (7)(A), (7)(B) & (7)(C)**] which attached a number of "*Diary Notes*", emails, and several Bank letters. More particularly, the hotly-contested Collateral Mortgage over Lease Title Nos. 029; 018; 020 & 022 was attached to Exhibit C–(7)(B).

A cursory examination of the disputed Collateral Mortgage clearly reveals the following:

- The 22 standard clauses in the body of the Mortgage are lifted from another document as evidenced by the different font style used in the body, from that in the cover, the signature page, the registration page and Schedule 2;

- The signature page is hand-dated: *"4th November 2009"* and is signed by Sandrino Traverso witnessed by Beatrice Rolland and, it is also signed by the Bank's Attorney Marilyn Kalangis witnessed by Dudley Wai on the Bank's behalf;

- The Certificate of Registration discloses that the Collateral Mortgage was registered on: *"... 14:00 hours this 01st day of November 2010"* and was lodged in respect of Title No. 12/0941/029 **only** without any reference to the other three (3) Titles listed on the cover page;

- None of the pages of the mortgage bears the mortgagor's initials ***"ST"*** at the foot of each page.

(vii) Lisa Nato – Manager Asset Management Unit, ANZ Vanuatu from March, 2014 until December, 2016. She deposed a sworn statement dated 26 August, 2016 [**Exhibit C (8)**] discussing several **Cautions** that had been lodged by the Bank seeking to prevent the transfer of the disputed Lease Title Nos. 018; 020; and 022. She agreed in cross examination that receipt of the Bank's solicitor's letter of 16 January, 2009 [**Exhibit C(4)**], was the ***"light bulb moment"*** when the bank first became aware that it's loans to the claimants were ***"under-secured"*** (whatever that means). As at 16 Sept 2009, the Bank still had no registered mortgage over the disputed Bellevue lots;

(viii) Lina Sam – Secretary at the Bank's legal advisors George Vasaris & Co., Barristers and Solicitors who deposed a sworn statement dated 9 January, 2018 **[Exhibit C(9)]**, in which she describes her employer's common practice of not dating Lands Department instruments until shortly before registration, in order to avoid the payment of penalties for late registrations.

(ix) Roger Douglas Jenkins – Chartered Accountant Fellow of CPA, Australia. Principal of the firm Business Management Services, who deposed a sworn statement dated 19 October,

2010 to which he attached a detailed Report comprising 320 pages, which he had prepared for ANZ Bank, Vanuatu in relation to the claimants' accounts and the interest charged to them by the Bank. **[Exhibit C(10)]**; and

(x) Sheng Lee – ANZ Vanuatu, Country Head since April, 2015.

In addition, the Bank's counsel relies upon four (4) sworn statements from deponents who, despite being timeously required by the claimants to attend court, were not produced for cross-examination. Over counsel's objections, the statements were Marked for Identification (**MFI**) as follows:

1) **MFI (A)** – sworn statement dated 1 December, 2011 of **David Schwenke** Head of Corporate Services, ANZ Vanuatu from January, 2006 to January, 2009 who was the senior Bank Officer mostly directly involved with the claimants' accounts;

2) **MFI (B)** – a second sworn statement of **David Schwenke** dated 13 June, 2017 deposed after he had seen the claimants' version of the disputed 4 June, 2008 Letter of Offer;

3) **MFI (C)** – sworn statement dated 19 March, 2013 of **Nigel Vira Toa**;

4) **MFI (D)** – a second sworn statement of 2 November, 2011 of **Nigel Toa**;

No witness was called by the Bank to identify the signature(s) and/or identity of the **deponents** of the MFIs nor was anyone called to formally produce them in Court. The four statements remained in that inchoate unexhibited state.

10. In respect of **these** four sworn statements Mr Hurley, relying on **Rule 11.7** of the **Civil Procedure Rules 2002** (*"the Rules"*), submits that a sworn statement that has been filed *"... becomes evidence in the proceeding unless ... ruled inadmissible."* In the absence of such a ruling in the present case, counsel forcefully submits, that the sworn statements of the Bank's absentee witnesses is admissible *"evidence"* which the Court should consider as it sees fit. Claimants' counsel, in objecting to the admissibility of the MFI statements, equally forcefully, submits that the Court ought to reject the statements as *"worthless"* in the absence of any cross-examination of their deponents, whom the claimants had sought within time, to have produced at the trial.

11. In Dinh v Polar Holdings Limited [2006] VUCA 6, the Court of Appeal relevantly observed of the evidential status of a sworn statement where the deponent was not presented for cross-examination, when it said:

REPUBLIC OF VANUATU COUR COURT LEX & SUPREME LEX REPUBLIQUE DE VANUATU

"... It is also plain from the judge's notes that the trial judge did not make any orders /rulings pursuant to ***Rule 4.12(3)(f) – "that*** *(the Appellant)* ***is not to participate in the trial"*** *owing to non-payment of his share of the trial fees: or indeed, under* ***Rule 11.7(1)*** *that the sworn statements filed on behalf of the Appellant are* ***"ruled inadmissible"*** *owing to a failure to present the deponents for cross-examination as required by the Respondent's counsel written notice.*

In this latter regard ***Rule 11.7(1)*** *expressly provides that* ***"a sworn statement that is filed and served becomes evidence in the proceedings ..."****. The Rule uses the present active tense* ***"becomes"****, not, may or will become. In the absence of a ruling of inadmissibility, the sworn statement filed and served by or on behalf of the Appellant became* ***"... evidence in the proceedings"*** *and could* ***not*** *be simply ignored by the trial Judge because the Appellant or the deponents did not appear at the trial to be cross-examined. Needless to say, absence of cross-examination goes to the weight,* ***not*** *the admissibility of the sworn statement."*

12. The Court of Appeal also observed in Colmar v Rose Vanuatu [2011] VUCA 20 at para 48:

> *"In drawing inferences from ... proved fact, there are two additional principles that apply. One is that all evidence must be weighed according to the proof which it was within the one side to have produced and the other to have contradicted: - Fairchild Glenhaven Funeral Services [2003] AC 32 ...* (the other) *... urged upon us, is that in limited circumstances, it is permissible to drawn an inference from the absence of a witness who could have given evidence to clarify a material fact. That principle has been adopted in Vanuatu: see* Barrett & Sinclair v McCormack [1999] VUCA 11: where the Court of Appeal said:
>
> > *"The unexplained failure of a party ... to call a witness may, although not necessarily must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure may also be taken into account in deciding whether or not to accept any particular evidence that relates to a matter on which the absent witness could have spoken, and entitles the trier of fact the more readily to draw any inference fairly to be drawn from other evidence that could have been explained had the opposing party chosen to do so by calling the absent witness."*

13. In similar vein Menzies J said in Jones v Dunkel [1959] 101 CLR 298 (HCA) at p 312 :

> *"In my opinion a proper direction in the circumstances should have made three things clear: (i) that the absence of the defendant as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence ; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference".*

14. I accept in this case, there has **not** been a complete failure on the Bank's part, to call relevant witnesses in that their sworn statements (*"evidence in chief"*) have been filed and served on the claimants in accordance with Rules **11.3** to **11.6** of the Supreme Court Rules. Rather, the Bank's

failure is in **not** availing a particular deponent, **David Schwenke** (a former Head of Corporate Banking in Vanuatu) for cross-examination as required in terms of Rule **11.7(4)**. I also accept that the Rules do **not** provide a clear consequence for such a failure and that ultimately, it is a matter of weight and discretion.

15. I also accept that Mr Schwenke's non-appearance, is not entirely the fault of the Bank which has made some efforts to facilitate his attendance at the trial, including, offering to pay for his "... *travel and related expenses (including any loss of profits)".* In addition, the Bank applied under Rule **11.8** for his cross-examination, to be taken by way of a "... *Skype connection".* Unfortunately, this was not pursued as events had overtaken it, including, my impending departure from Vanuatu. Having said that, the circumstances of David Schwenke leaving the Bank's employ is unclear, but whatever the reason, his work at the Bank was described as less than *"ideal"*. Indeed, his supervisors in dealing with David Schwenke's *"legacy"* (meaning the state in which he left the claimants' accounts at the Bank), described them as *"having been mismanaged over a period of time"*. Besides the absence of a witness subpoena, this could be a telling factor in the clear reluctance on David Schwenke's part to attend as a potentially adverse even hostile, witness for the Bank and/or be cross-examined on the contents of his sworn statements.

16. If any inference is to be drawn from the absence of cross-examination, of David Schwenke, it would in my view, be against the party seeking to rely on his untested sworn statements, namely, the Bank, which bears the burden of establishing its counter-claim against the claimants' particularised defence of fraudulent dealings by the Bank in its reliance on its version of the Letter of Offer of 4 June, 2008. I note also, the Bank's counsel frankly accepts, *"... it is important for the court to see and hear the cross-examination of Mr Schwenke".*

17. David Schwenke deposed in his first sworn statement that, whilst employed by ANZ Vanuatu between January 2006 and January 2009, he was "... *largely responsible ..."* for the claimants' accounts maintained with the Bank. He also described the signing options that he adopted when dealing with ANZ Letters of Offer as follows:

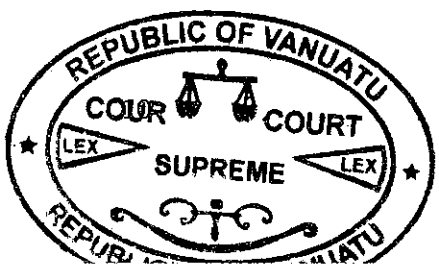
    (a) ... (not relevant) ...;

    (b) *they are often mailed with the client returning them executed;*

    (c) *at times ANZ's customers would read and return them for execution in my presence, or my assistant's presence or both;*

    (d) *at times I would deliver and have the clients execute on the client's premises during a visit; and*

    (e) *at times I would prepare and hold for the client to call, read and execute".*



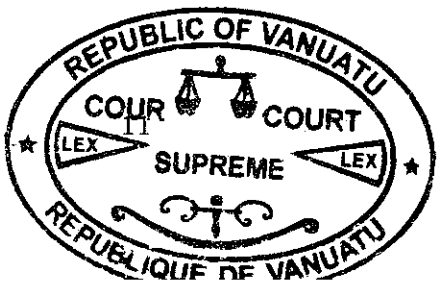
Unfortunately, he could not recollect which of the signing options at items (b) to (e) above, relate to each of the claimants' several Letters of Offer. Although he admits preparing and signing the Letter of Offer of 4 June, 2008, he denies any recollection of Sandrino Traverso's *"... request to remove reference to the collateral mortgage over leasehold title no's ..., 018, ... 020 and ... 022 from ANZ's letter dated 4 June 2008..."* (as apparently occurred in the claimants' version of the disputed Offer letter which is also dated 4 June 2008).

18. Furthermore, he deposes in his second sworn statement, without referring to the claimants' version of the disputed Offer letter which he had seen, that *"... the simple crossing off of items or the removal by "white-out" (or other such method) in the letter of offer would not have been acceptable ..."*. David Schwenke without any recollection of the particular signing option adopted by him in his dealings with the claimants, nevertheless denies that he ***"... would ever have asked Mr Traverso to sign the execution page of the collateral mortgage document detached from the totality of the mortgage document ..."***.

19. By way of complete contrast, that is precisely what Mr Traverso and his secretary deposed occurred in their respective sworn statements (***see also:*** the claimants' answers to the Bank's request for particulars dated and filed on 10 February, 2017). In this regard also, it may be noted that the relevant ANZ driver was not identified or deposed and, at no stage, is it suggested by the Bank or by David Schwenke that it was he who had personally presented the disputed mortgage document at the claimant's business premises, for his signature. In the circumstances, accepting that the disputed Collateral Mortgage document was delivered by the Bank's driver, it is distinctly possible that, unbeknownst to David Schwenke, only the signature page of the document was delivered for execution and return.

20. Noting the Bank's Amended Counterclaim and Reply, and the claimants' Defence and Counterclaim, and given Sandrino Traverso's evidence and the fact of their production as Exhibits, there can be **no** doubting the existence of two (2) versions of the Bank's Letter of Offer dated 4 June, 2008. These are, an original version which is relied upon by the Bank (hereafter *"the Bank's version"*), and, a later materially-altered version relied upon by the claimants (hereafter *"the claimants' version"*) which clearly provides: ***"This letter is to prevail over previous letters of offer in respect of our agreement"***

21. In this particular regard, nowhere in the Bank's pleadings or numerous sworn statements, is it positively averred or deposed, that the claimants' version of the 4 June, 2008 Letter of Offer is fraudulent or, has been improperly photo-shopped or *"doctored"*, or, is **not** an authentic ANZ document. Neither has the author of the said Offer letters, David Schwenke, himself, deposed that the signature on the claimants' version, is not his, or is a forgery, as might be expected if it was not genuine. Neither party saw fit to call a handwriting expert.



22. Of particular significance in the Bank's version is, item 4, under the sub-heading "***Securities Held***" which reads:

> ***"4. Collateral Registered Mortgage over Title # 12/0912/022, 12/0912/018 & 12/0912/020. Stamped Collateral to Title no. 11/OE31/090."***

The heading, the tense, and the wording under it, especially: "*The following securities held by the bank are to remain in full force and effect ...*" including the sub-heading suggests to the reader that, as at the date of the letter, the Bank already had a registered collateral mortgage over Title Nos. 022, 018, & 020. It is common ground however, that **no** such collateral mortgage had/has ever been registered over the said titles in the Bank's favour. If I may say so, the above item is unduly optimistic. It should have been clearly worded so as to accurately reflect the prospective reality of the Bank's position, such as for ***eg.*** in the wording under the same heading in the Bank's Letter of Offer dated 21 November, 2006. Needless to say, item 4, as worded, misrepresents the true position and is capable of giving the reader (including senior ANZ management with no personal involvement in the claimants' loan accounts) a false sense of security.

23. While the claimants' version of the 4 June, 2008 letter, is in almost identical terms to the Bank's version, there are significant differences including re-wordings, deletions, blanked-out spaces and page re-numberings, as follows (adopting the page numbers of the Bank's version):

a) On page 1 – para 2 is re-worded to give priority to the claimants' version and the four last items under the sub-heading: "***Enterprise Traverso Sandrino***" in the Bank's version are removed, leaving a blanked-out space. Additionally, the "***Total Facility Limits***" computation is also reduced to reflect the said removals;

b) On page 2 – item 4 is completely removed, leaving a blanked-out space in its place under the sub-heading: "***Securities Held***";

c) On page 3 – the two paragraphs under the heading "***Changes to Interest Rates***" have been amalgamated into a single shorter, re-worded paragraph limiting the maximum chargeable interest to "***... 13% per annum***" and again, leaving a blanked-out space;

d) On page 7 – under the "***Overdraft Facility – VUV***" heading, the font size of the second line of the **Term/Repayment** item has been reduced from what appears in the Bank's version so to match the first line and the rest of the page in the claimants' version, and also, the contents of the item has been reduced to a single word: "*Revolving*". Likewise, the **Excess Fee** item in the claimants' version is shortened to the word: "*Waived*" and the **Penalty Interest** has been reduced from "***21 %***" to "***13 %***";

e) On page 8 – the **Loan Administration Charge** item is reduced to a single word: *"Waived"* and the entry entitled: **Immigration Bond Facility - (VUV)** which is manually crossed-out

with a single diagonal line across the body of the item and a hand-written word: **"*CANCEL*"** to the right of the line in the Bank's version, is completely removed leaving a blanked-out space in the claimants' version extending to almost 2/3rds of the page. The bottom page number "***8***" has also been removed;

f) Page 9 – this page in the Bank's version has three (3) entries of which the 2nd entry entitled: **Immigration Bond Facility - (VUV)** is again manually crossed-out with a single diagonal line across the body of the item with a hand-written word: "***CANCEL***" to the right of the line. In the claimants' version however, this entire page is completely removed to mirror the removal of the 4 items in page 1 (*see above*);

g) Page 10 – this page in both versions while containing identical headings and information, is re-numbered: "***9***" in the claimants' version;

h) Page 11 – this **ACCEPTANCE** page in the Bank's version is signed by " *Monsieur Sandrino Traverso"* and dated :*"04/06/2008"*. In the claimants' version however, this page is numbered: "***10***" and the signature is dated: *"06/06/2008"*.

24. The blanked-out spaces at pages 1, 2, 3 & 8 (noted above), are clearly visible in a "*page-by-page*" comparison of the claimants' version, because the spaces and spacing between lines, items, and paras have **not** been re-adjusted after the several re-wordings and deletions were made to the Bank's version. Likewise, the blanked-out spaces are as obvious as the handwritten diagonal crossings and the word: "*CANCEL*", which appear at pages 8 & 9 of the Bank's version.

25. After carefully considering the evidence about the variations between the two Letters of Offer , I am satisfied that the Bank's untested evidence (which does **not** include clear written internal instructions) about the strictness required in the formatting and re-issuance of any amended or altered Letter of Offer, is both exaggerated and given with the benefit of hindsight. The reality, in my view, is that, it is a matter of personal judgment and practice of the particular officer concerned and I so find

26. Indeed, the Bank's version of the 4 June, 2008 Letter of Offer which it relies upon, contains large hand-written erasures, over-writings and additions in separate pages that have **not** been counter-signed or initialed to signify acceptance by the contracting parties, as well as the existence of different font sizes in the same item at page 7 which has **not** been corrected. Nor were these obvious *"imperfections"* corrected in a re-issued clean offer letter as occurred in the claimants' version of the 4 June, 2008 Letter of Offer, the existence of which, the Bank denies any record or knowledge.

27. I am satisfied that **both** versions or copies of the Letter of Offer of 4 June, 2008 are genuine and were authored and signed by David Schwenke. I am also satisfied that despite his untested claims of the unacceptability in a Letter of Offer of, "*... crossing off or removal by white-out...*", David Schwenke did redraft and reissue the claimants' version of the 4 June, 2008 Letter of Offer by deleting item 4 on

page 2 and, with it, all reference to the disputed Collateral Mortgage over lease titles 018, 020, & 022. Likewise, all mention of Immigration Bonds and a Foreign Currency Dealing Limit as well as other changes earlier identified, including, leaving unadjusted blanked-out spaces earlier identified (***above***).

28. In this particular regard, the only direct oral evidence of the changes made and the re-issuance of the Bank's Letter of Offer of 4 June, 2008 is that of Mr Sandrino Traverso which I believe and accept as more probable than the untested, equivocating, and incomplete sworn statements of David Schwenke given in hindsight. Similarly, I also accept the claimants' clear and forthright testimony about the signing of the undated signature page of the Bank's disputed Collateral Mortgage at their business premises, in the absence of the other pages. I reject David Schwenke's untested and unsupported contrary assertions.

29. In addition, I have also considered the evidence of Beatrice Manuake who deposed a sworn statement under her maiden name *"Rolland"* dated 9 June, 2017 [Exhibit – D(7)] in which she deposes that whilst working as the secretary for Mr Sandrino Traverso in 2009, she received at their business premises at Champagne Estate, from a familiar driver employed by ANZ Bank, a single signature page which she gave to her employer for signing and after Sandrino Traverso had signed in the space provided, she witnessed his signature and returned the page to him.

In her brief cross-examination, which failed to probe her knowledge of the identity of the ANZ driver or her recollection of the events deposed, she firmly denied being asked to sign the ANZ driver's delivery book. Likewise, she denied and I accept that **Dudley Wai** whose name appears on the same signature page (who is described above as: *"unhelpful"*), was not present at the time with them and witnessed their signatures on the page.

30. For completeness, I record having received and considered the following sworn statements of Sandrino Traverso who deposed and filed 5 sworn statements upon which he was cross examined as follows:

- Exhibit D(2) – sworn statement dated 5 October, 2011;
- Exhibit D(3) – sworn statement dated 3 October, 2011;
- Exhibit D(4) – sworn statement dated 7 November, 2011;
- Exhibit D(5) – sworn statement dated 26 September, 2012;
- Exhibit D(6) – sworn statement dated 6 July, 2017.

31. In the light of the forgoing, I can now answer the following issues of the Bank set out in its lawyers document dated 27 May 2019 as follows:

> *"1. Did Sandrino Traverso sign ANZ Bank (Vanuatu) Limited's (**ANZ**) letter of offer dated 4 June 2008 (annexed at pp. 219A – 219K to Exh CMS1 to the sworn statement of Christopher Michael Shallvey sworn 20 December 2017)? –* **Ans: YES**

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX

2. *Did ANZ issue to Sandrino Traverso a second letter of offer dated 4 June 2008 (attached to Thornburgh Lawyers' letter to George Vasaris & Co dated 16 September 2016 pp 220 – 232 of CMS1) ? –* **Ans: YES on 6 June 2008.**

3. *Which of the terms and conditions in the letter of offer dated 4 June 2008 (referred to in issues 1 and 2 above) is binding on ANZ and Mr Traverso? –* **Ans: The second offer letter also dated 4 June 2008 and accepted by Sandrino Traverso on 6 June 2008 is the binding letter.**

4. *Is the mortgage over title nos. 12/0941/029, 12/0912/018, 12/0912/020 and 12/0912/022 dated 4 November 2009 enforceable (annexure A to the sworn statement of Elizabeth David filed on 2 November 2011)? –* **Ans: NO, it was never registered except for a collateral mortgage over title No. 12/0941/029.**

5. *Should an order be made in the terms of the relief claim at paragraph B and C of the Amended Counterclaim filed on 5 September 2016 to the following effect:*

   a) *An order that Traverso, Mara and Atom Limited forthwith take all necessary steps to execute all necessary instruments in registrable form and lodge them with the Director of Land Records to reverse the surrender of and/or to transfer leasehold title nos. 12/0912/018 and 12/0912/020 titles and transfer them to Traverso; -* **Ans: NO**

   b) *An order that Traverso, Mara and Veca Limited forthwith take all necessary steps to execute all necessary instruments in registerable form and lodge them with the Director of Land Records to transfer leasehold title no. 12/0912/022 from Veca Limited to Traverso. –* **Ans: NO**".

32. I turn next to consider the claim that the Bank had charged the claimants' loan account with interest rates that exceeded a statutory maximum rate under Section 56 (2) of the Land Lease Act [CAP. 163] (set out in para 7 above).

33. In this regard, it is common ground that the *"appointed rate"* of interest is that which is set out in the various Loan letters and Overdraft facility letters issued to the claimants by the Bank during the course of their business relations. In particular the *"appointed rates"* ranged between 8.25% to 9.90% per annum and therefore, the maximum penalty rates of interest that could lawfully be charged by the Bank, would range between 11.25% and 12.90% per annum.

34. It is conceded by the Bank's officers and the expert witness Roger D Jenkins that the interest rates charged to the claimants' loan accounts maintained with the Bank, exceeded the maximum allowable amount in numerous instances and adjustments were and would need to be made to bring them into compliance with the law.

35. Notably, the expert's written instructions did not include a clear reference to the provisions of Section 56 (2) of the Land Lease Act Cap 163 in the requested recalculations nor is it referred to anywhere in

the experts final Report. The absence however of any mention or reference to the statutory provision does not exclude its application to the claimants' mortgages nor deny its mandatory nature: *viz "the higher* (penalty) *rate shall not exceed the appointed* (contracted) *rate by more than 3 per centum per annum".*

36. Having said that, I note the expert Roger D Jenkins received two instruction letters from the Bank's lawyers relating to the claimants five (5) Vatu accounts maintained with the Bank as follows:

1. Acc No: 798122 – Enterprise Traverso (Overdraft facility);
2. Acc No: 923256 – Sandrino Traverso (Home Loan);
3. Acc No: 963357 – Enterprise Traverso (Residential Loan Fully Drawn);
4. Acc No: 1060048 – Enterprise Traverso (Fully Drawn Advance); and
5. Acc No: 1119084 – Sandrino Traverso (Residential Investment Loan from 22 Nov 2006).

37. The first lengthy instruction dated 21 September 2012 sought the ascertainment of the correct balances due on the claimants above accounts *"from 22 November 2006 to date"* (ie. 21 Sept 2012).

38. The experts' conclusion after carrying out the requested recalculation exercise is summarized as follows in his Report dated 17 October 2012: *"...the amounts debited by the Bank are all essentially in accord with the terms specified in the various Letter of Offer ...* The Report also noted discrepancies in the charging of *"Excess Fees"* especially from July 2008 to April 2009. The recalculated interest charges also revealed: *"... divergence from the actual interest charged by the Bank, with interest over-charged ... in years 2006, 2008, and 2009 ..."* The expert also states: *"It does appear that the Bank has instituted changes* (in interest rates) *between Letters of Offer ...* (however) *we do not have sufficient information to express an absolute view or why the Bank's calculation of interest differ from those of the Letters of Offer."*

39. The Bank's second shorter instruction letter dated 16 October 2012 sought a recalculation of interest on the claimant's accounts from July 2009 using an interest rate of 13.5% per annum on Accounts (1), (3), and (4) (above) and, a rate of 10.5% per annum for Accounts (2) and (5) (above). In this latter regard, I note the adopted interest rate figure both exceeds and is less than the maximum allowable amounts under Section 56 (2) of the Land Lease Act earlier referred to.

40. I accept the final loan account balances set out in the Table provided in the penultimate page of the expert's Report as they relate to Acc Nos: (2) and (5). As follows:

Acc No: 923256 – Recalculated Balance @ 10.5% pa = **VT14,319,359**; and
Acc No: 1119084 – Recalculated Balance @ 10.5% pa = **VT21,642,291**.

However, the balances for the remaining three Loan Acc Nos: 798112, 96337, and 160048 are directed to be further recalculated using an interest rate of 12.9% per annum from July 2009 until 31 July 2012.

41. After the foresaid recalculations are completed by the expert, the resultant Account Balances are thereafter accepted and adopted by the Court for the entry of a judgement in favour of the Bank against the claimants and secured by the Bank's registered mortgages over Lease Title Nos 11/OE31/090 and 12/0941/029 which are to be discharged when the judgement debt is finally paid up.

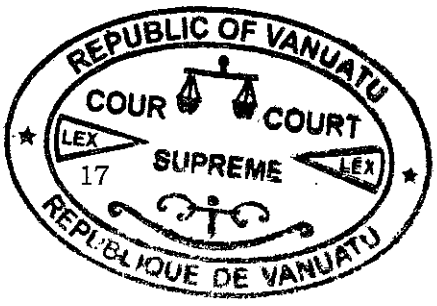
42. In light of the foregoing, this Courts' answers to the Bank's **issue (6)** are as follows:

> *"Should an order be made for the relief claimed at para-A of the Amended Counterclaim by way of monetary damages in respect of Mr Traverso's outstanding facilities with ANZ:*
>
> (a) *As per the account balances in respect of those facilities as at 31 July 2012 as set out in the report of Roger D Jenkins dated 12 October 2012 and to be calculated thereafter in accordance with terms and conditions of the Loan Agreement between ANZ and Mr Traverso?* ***Ans:*** **YES, but subject to the judgement sum being awarded a simple interest rate of 4% per annum from the date of this judgement until fully paid up.**
>
> *(b) Should the monetary damages in respect of Mr Traverso's outstanding facilities with ANZ be assessed on some other basis?* **Ans: See answer to (a) above.**

43. I turn finally to consider the Bank's claim against the Director of Lands. In this regard the State provided several sworn statements from the former and present Director of Lands. Paul Gambetta. He provided a sworn statement dated 22 November, 2018 - **[Exhibit CD(5) - (1)]**. He produced departmental records relating to four (4) lease title Nos. # 12/0941/ 029; 12/0912/ 018; 12/0912/ 020 & 12/0912/022 and relevantly deposed (as amended):

> *"On 1 November, 2010, a Collateral Mortgage ... dated 4 November 2009 between ... (*Sandrino Traverso*) ... as Mortgagor and ANZ (Vanuatu) Limited a s Mortgagee over Lease 029 was lodged to the Department for registration ...*
>
> *I confirm that ... (*Sandrino Traverso*) ... had already transferred Leases 022, 020 and 018 in year 2009 but ANZ lodged a caution in year 2011.*
>
> *I confirm that when the Mortgage was registered, ... (*Sandrino Traverso*) ... was no longer the lease proprietor of Leases 022, 020 and 018".*

Later he deposed in chief:



"I confirm that any damages suffered by the Defendant was occasioned by its own negligence action for failure to secure its interest before granting the loan to.. (Sandrino Traverso) ... as the Leases were already transferred from ... (him) ... before the Mortgage was executed and registered ...

Finally, I confirm that the Department registered the above lease dealings in good faith based on the information supplied and will rely on the full terms and effect of section 24 of the Act and Regulation 4 of the Land Leases General Rules".

44. As for the Bank's claim against the Director of Lands for the wrongful failure to register its cautions and/or the wrongful removal of the same, after considering the competing evidence both oral and by way of sworn statements, I am satisfied that the Bank cannot succeed in its claim.

45. If I am wrong, however, in the rather unusual and special circumstances of this case where the Court has upheld the claimant's claim in successfully resisting the Banks' claim to be entitled to register collateral mortgages over the claimants' three (3) lots in Bellevue albeit after trial, it would be incongruous to require the Director of Lands to pay damages and/or compensation for his failure in respect of the Bank's cautions in circumstances where the Bank had no enforceable caveatable interest in respect of the claimant's three (3) lots in Bellevue Estate which the Bank had sought to caution.

46. In other words, the Bank is not entitled to seek and obtain damages from the Director of Lands for failure on his part to register the Bank's cautions over land leases which the Court has found was never agreed to be mortgaged by the claimants to the Bank.

47. Whatsmore, even if the Bank had a caveatable interest in the claimants: three (3) Bellevue lots, they had all been transferred out of the claimant's ownership to persons and entities with whom the Bank had no relationship or interest long before the caveats were lodged.

48. For completeness, the claimants claim against the Bank for VT150,000,000 damages is dismissed as unproven.

49. The parties having partially succeeded in this case, the Court makes no order as to costs.

DATED at Port Vila, this 10th day of April, 2025.

BY THE COURT

for **D. V. FATIAKI**
Judge.

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU