

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

Civil
Case No. 24/3272 SC/CIVL

BETWEEN: BRED (VANUATU) LIMITED
Claimant

AND: GORDON ARNHAMBAT
First Defendant

AND: MARY ARNHAMBAT
Second Defendant

AND: FIONA ARNHAMBAT
Third Defendant

AND: WILLIAM ARNHAMBAT
Fourth Defendant

AND: WAIVEN ARNHAMBAT
Fifth Defendant

AND: TANSY ARNHAMBAT
Sixth Defendant

AND: FRIDAH ARNHAMBAT
Seventh Defendant

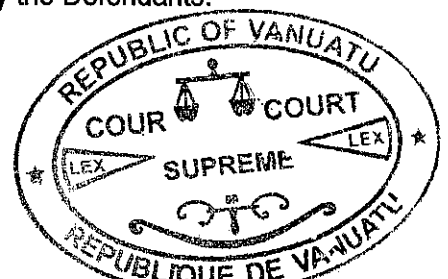
AND: ELSEEN ARNHAMBAT
Eighth Defendant

Date of Hearing: 19 March 2025
Before: Justice M A MacKenzie
Counsel: Claimant – Ms S Mahuk
Defendant – Mr J Boe

DECISION AS TO SUMMARY JUDGMENT APPLICATION

The application

1. This is an application for summary judgment. It is opposed by the Defendants.

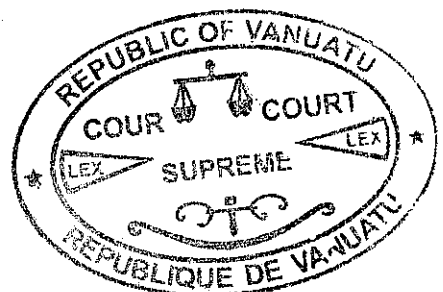


Relevant background

2. The First Defendant, Gordon Arnhambat is the registered proprietor of leasehold title 12/0631/345 (*"the lease title"*). The Second to Eighth Defendants are relatives of Mr Arnhambat currently residing on the property.¹
3. Mr Arnhambat took out a mortgage in May 2011 to build a dwelling house. It was a re-financing of an earlier facility with Westpac (Vanuatu) Limited. The loan amount increased over time through various agreements executed by the parties to VT 4,560,000. The mortgage fell into arrears. Eventually, Bred Bank sought and obtained mortgagee sale orders under s 59 of the Land Leases Act. By an order dated 12 April 2023, Bred (Vanuatu) Limited (*"Bred Bank"*) was empowered to sell and transfer the lease title.
4. In 2023, the Court of Appeal dismissed Mr Arnhambat's appeal against the mortgagee sale orders. Then in 2024, the Court of Appeal dismissed Mr Arnhambat's appeal against an order declining and dismissing an application to suspend the mortgagee sale order. The history is traversed in the two Court of Appeal judgments: *Arnhambat V Bred (Vanuatu) Limited* [2023] VUCA 33 and *Arnhambat v Bred (Vanuatu) Limited* [2024] VUCA 35.
5. Bred Bank has instructed L'Attitude Property to market and sell the property under the mortgagee sale order. The bank now seeks vacant possession, because although there has been interest in the lease title, vacant possession has been a concern for prospective purchasers.² Therefore a trespass notice dated 5 April 2024 was issued. The trespass notice named all the adult occupants living at the property. The notice provided that occupation of the property was prohibited because Bred Bank in exercising its mortgagee in possession power of sale, was empowered to act in all respects in place of the proprietor of the lease. The Defendants were given 30 days to vacate the property, failing which eviction proceedings would be filed. The trespass notice was prominently displayed on the largest tree in the centre of the lease title. Mr Arnhambat and his family occupying the lease title were also served with the trespass notice at various different times.
6. The Defendants have failed to vacate the property and remain in possession and occupation of the property. As a result, Bred Bank seeks eviction of all the Defendants.

¹ All adults occupying the property must be served with an eviction claim: *Lop v Kaukare* [2025] VUCA 10, *Iaus v Noam* [2017] VUCA 40

² Refer paragraph 6, Sworn statement Caroline Pedro filed on 18 October 2024



The claim

7. Bred Bank is empowered by the mortgagee sale orders made pursuant to s59 of the Land Leases Act to enter onto the lease title and act in all respects in the place and on behalf of the proprietor of the lease.
8. Acting under the mortgagee sale order, Bred Bank seeks an eviction order and other ancillary orders on the basis that the Defendants are trespassers by continuing to occupy the property absent proprietary rights, consent or authority of Bred Bank. Further, having been issued with a trespass notice to vacate the property, they have failed or refused to vacate the lease title voluntarily.

The defence and counterclaim

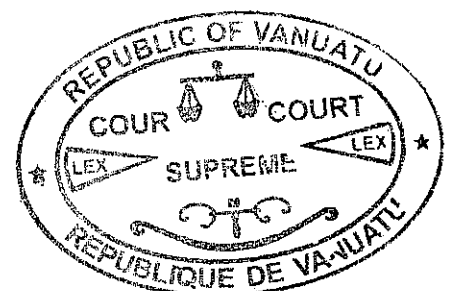
9. The defence is that the Defendants have "*proprietor and equitable*" rights to remain on the lease title. The Defendants deny being trespassers, as they have legally resided on the lease title and have built houses and residences for which they need to be compensated before they can move out of the property.
10. Further, by way of counter claim the Defendants seek compensation for the houses and residences located on the lease title.
11. As such, the Defendants seek dismissal of the claim, and an order that Bred Bank pays compensation for the houses and residences located on the lease title.

Summary Judgment

12. Rule 9.6 of the Civil Procedure Rules 2002 addresses the summary judgment procedure. It is one of the ways provided for in Part 9 of the Civil procedure Rules for ending a proceeding early.
13. Rules 9.6 (7) and 9.6 (9) are applicable and say: -

"(7) If a Court is satisfied: -

- (a) The defendant has no real prospect of defending the claimant's claim or part of the claim; and*
- (b) There is no need for a trial of the claim or that part of the claim, the Court may:*
- (c) Give judgment of the claim or part of the claim;*



(d) Make any other orders the Court thinks appropriate.

.....
(9). The Court must not give judgment against the defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."

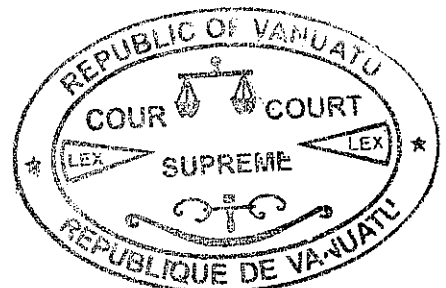
14. Relevant principles include:

1. The onus is on the Claimant to establish the grounds set out in Rule 9.6(7)(a) and (b): *Sugden v Rolland* [2022] VUSC 145 at 22.
2. A real prospect means one which is realistic not fanciful; *Swain v Hillman* [2001] 1 All ER 91, approved by the Court of Appeal in *Bokissa Investments Ltd v RACE Services Pty Ltd* (In Liquidation) [2003] VUCA 22.
3. The need for caution when considering an application for summary judgment was emphasized in *ANZ Bank (Vanuatu) Ltd v Traverso* [2012] VUSC 222. Sey J said that it is judicially settled that the summary judgment procedure is designed to enable a claimant to obtain swift judgment against a defendant who has no real prospect of defending the claimant's claim. Sey J also sounded a note of caution when Her Ladyship said:

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

Submissions

15. For Bred Bank, Ms Mahuk submits that the Defendants have refused to voluntarily vacate the property, so an eviction order is necessary to remove them from the property and deliver vacant possession to Bred Bank.
16. Ms Mahuk further submits that the claim for compensation is misplaced because the Court Orders and the mortgage canvas the whole property, which is the land and the improvements, pursuant to the relevant definitions of "land," "lease" and "mortgage" in the Land Leases Act. Therefore, there is no merit to the defence and no reasonable chance that the defence could succeed.



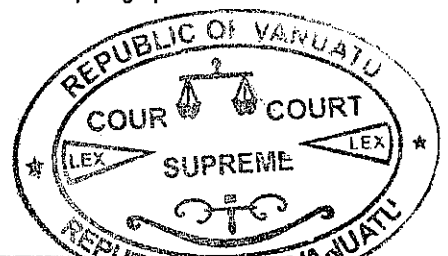
17. Mr Arnhambat opposes summary judgment on the basis that the Defendants should not be evicted without being compensated. He seeks compensation in the sum of VT 12,500,000, as per a valuation report attached to his sworn statement filed on 15 November 2024, before eviction orders can be issued.³ A small but significant point is that the valuation of the property (taking into account the unexpired portion of the lease) at VT 12,500,000 includes not only the dwellings but the land. In essence, Mr Arnhambat is asking the Bred Bank to pay him the full market value of the lease title. That is clearly an untenable proposition.
18. At the summary judgment hearing, Mr Boe accepted that the land includes the buildings situated on the land. Mr Boe made two primary submissions on behalf of the Defendants:
 - a. The Defendants are concerned that they will lose everything.
 - b. That the welfare of the children would be impacted if the Defendants are evicted as they will be on the street. As such, the Defendants would like one more chance to repay the mortgage. Once again, the possibility of Mr Arnhambat's son paying off the mortgage was raised by Mr Boe⁴.
19. While these two matters are not relevant to whether there is a reasonable prospect of defending the eviction claim, I will address them as preliminary issues.
20. Mr Arnhambat's concern that he and the family will lose everything is not correct. The sale order includes a provision that the net proceeds of sale, after repayment of the mortgage and sale costs, is to be paid to Mr Arnhambat. So, it is in his interests to co-operate with the sale process or otherwise the costs will increase and Mr Arnhambat's share will correspondingly decrease.
21. As Ms Mahuk rightly pointed out during submissions, Mr Arnhambat still has a right to redeem the mortgage. To redeem the mortgage, the full amount outstanding is payable, including the arrears. But as she submitted, this claim is not about whether Bred Bank have the right to exercise the powers under the Order of 12 April 2023. That issue has been determined by the Court of Appeal in 2023 and 2024. This claim is for eviction of the Defendants as Bred Bank now seeks vacant possession.

Discussion

22. The first issue is whether Bred Bank has a right to possession of the lease title?

³ As set out at paragraph 5 of Mr Arnhambat's sworn statement filed on 15 November 2024

⁴ This issue was discussed in *Arnhambat v Bred Bank* [2024] VUCA 35. See in particular paragraphs 11 and 14.



Under the terms of the mortgagee sale order, Bred Bank is empowered to do the following:⁵

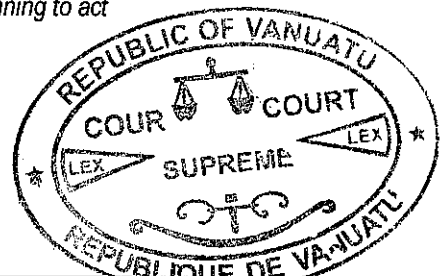
1. As mortgagee, to sell and transfer the property contained in lease title 12/0631/345.
 2. As mortgagee, pending sale and transfer, to enter on the property and act in all respects in the place of and on behalf of the proprietor of the lease.
23. Ms Mahuk contends that Bred Bank is rightfully entitled to possession because of the terms of the mortgagee sale order. The order made pursuant to s 59 of the Land Leases Act empowers Bred Bank, as mortgagee, pending sale and transfer, to enter on the property and "*act in all respects in the place and on behalf of the proprietor of the lease*". That logically must include the right to possession of the lease title, because ordinarily the proprietor of a lease title has the right to exclusive possession of the land,⁶ and therefore the right to decide who can occupy the property. The bank contends that the Defendants are trespassing because they have refused to vacate the lease title, following the written request for them to do so. As the Court of Appeal has said, trespass is not about ownership but about possession.⁷
24. The defence asserts that the Defendants have proprietor and equitable rights to remain on the lease title. This contention was not taken any further in the written or oral submissions made. In fact, at paragraph 2.3B of the written submissions,⁸ Mr Arnhambat acknowledged that Bred Bank has mortgagee sale orders and that "*The Claimant Bank has a valid claim as well. The Defendants don't dispute that*"
25. Bred Bank is entitled to act in all respects in the place and on behalf of the proprietor of the lease, so has a right of possession of the lease title for the purposes of sale and transfer of the lease. That must include decisions about occupation of the lease title during the sale process. Bank has asked the Defendants to vacate the lease title by service of the trespass notice and given them 30 days to vacate the property. The Defendants have failed to vacate the lease title, and so are unlawfully occupying the lease title.
26. The second issue is whether the Defendants are entitled to compensation for the buildings prior to eviction?
27. The defence asserts that the Defendants need to be compensated for the houses and residences before they can move out of the property. But what is required for an eviction order is a determination that the Defendants are unlawfully occupying the lease title. The

⁵ See the Orders dated 12 April 2023

⁶ See the definition of "lease" in the Land Leases Act

⁷ Warput v Santo Veneers Ltd [2004] VUCA 18

⁸ Filed by Mr Arnhambat on 7 March 2025 prior to Mr Boe filing a notice of beginning to act



Defendants claim to compensation for the buildings is a separate issue. Put another way, any entitlement to compensation (if at all) is not a precondition to an eviction order, which can only be made if the Defendants are trespassing. Any defence based on a perceived right of compensation before eviction can be ordered cannot succeed.

28. Ms Mahuk's submission is that the Defendants have no entitlement to compensation in any event because the buildings are part of the land. In order to assess that submission, the starting point is the Land Leases Act, which contains relevant various definitions.

29. "Land" is defined in the Land Leases Act as:

"land" includes land above the mean high water mark, all things growing on land and buildings and other things permanently affixed to land but does not include any minerals (including oils and gases) or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working;

30. "Improvements" are defined as:

"improvements" includes the reclaiming of land from the sea, clearing levelling or grading of land, drainage or irrigation of land, reclamation of swamps, surveying and making boundaries, erection of fences of any description, landscaping of land, planting of long-lived crops, trees or shrubs, laying-out and cultivation of nurseries, buildings and structures of all descriptions which are in the nature of fixtures, fixed plant and machinery, roads, yards, gates, bridges, culverts, ditches, drains, soakaways, cesspits, septic tanks, water tanks, water, power and other reticulation systems, dips and spray races for livestock;

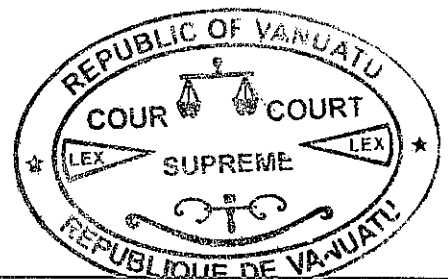
31. "Lease" is defined as:

"lease" means the grant with or without consideration, by the owner of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease;

32. "Mortgage" is defined as:

"mortgage" means an interest in a registered lease given as security for the payment of money or money's worth, and includes a sub-mortgage and the instrument creating a mortgage;

33. Pursuant to the Land Leases Act, "land" includes buildings and other things permanently affixed to land. A mortgage is an interest in a registered lease given as security. A lease is the grant by the owner of the land of the right to exclusive possession of his land. Ms



Mahuk's submissions are predicated on "land" including buildings, without addressing the issue of whether they are fixtures, which usually depends on the degree of annexation to the land. As explained below, the general legal principle is that once a chattel becomes a fixture then it forms part of the land. Under the Land Leases Act, "improvements" includes "*buildings and structures of all descriptions which are in the nature of fixtures*" and "land" includes "*buildings and other things permanently affixed to land*".

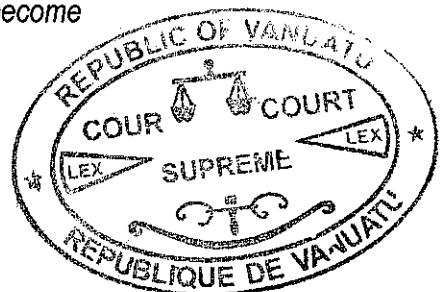
34. Counsel did not refer the Court to any cases in Vanuatu that have addressed this issue. However, while not squarely on point, a New Zealand case, *Cockrell v Ward* [2013] NZHC 2368 provides assistance.
35. In *Cockrell v Ward* the previous owner of the property (the Defendant), sought compensation for damage done to fixtures after the mortgagee sale of their property and the new owners (the plaintiffs) had taken possession. The Defendant claimed that certain fixtures on the property, including a hangar building and crops remained his property after the sale notwithstanding the transfer of the title to the land on which they stood. The Court relevantly said:

"[25] *Hinde, McMorland and Sim state:*

Broadly, a fixture is anything, once a chattel or personal property, that has become so attached to land as to form in law part of the land and to have become property. The principle is expressed in the maxim "quicquid plantatur solo cedit" — whatever is affixed to the soil belongs to the soil. It is very difficult to say with precision what constitutes an annexation sufficient for this purpose, but the practical consequences of a chattel becoming a fixture is that property to the chattel will, by operation of the law pass from the owner of the chattel to the owner of the land.

[26] *In the leading textbook on personal property in New Zealand, Garrow and Fenton's Law of Personal Property, the position is explained in the following terms:*

The law of fixtures represents an intermediate zone between the law of personality and of realty. It exists because of the self-evident fact that chattels are frequently affixed or attached to land; as such a chattel may cease to be an item of personal property in its own right and become part of the land. The question of whether a chattel has been affixed so as to become



part of the land arises in a vast range of circumstances and the number of cases in the area, some of them conflicting, bears witness to the difficulties judges have had in this area.

[27] The legal position is that, in general, a transfer of the land to which the fixtures are attached results in the new owner of the land becoming the owner of the fixtures.

...

[34] [...] It is not the case that all buildings, such as houses are to be regarded as fixtures all or part of the land. I respectfully agree with the following passage from Garrow and Fenton:

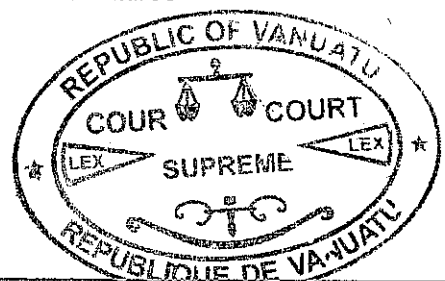
Posts placed in the soil by the occupier, concrete walls, asphalt paths, concrete steps, houses built on land and the constituent parts such as the doors, windows, walls, chimneys, crates, locks and the like normally belong to the owner of the soil and cease to be personal property.

[35] In the case of *Elitestone Ltd* the question arose whether the house was or was not within the traditional category of attachments. In the case there was photographic evidence of the house. In his speech, Lord Lloyd said:

For the photographs show very clearly what the bungalow is, and especially what it is and what it is not. It is not like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If the structure can only be enjoyed in situ, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site and therefore cease to be a chattel.

.....

[38] The conclusion that I have reached with regard to the fixtures in this case is that irrespective of the form of contract between the defendant and the mortgagee bank, such items as were fixtures

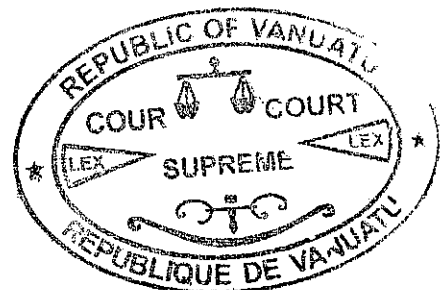


passed to the plaintiffs when they acquired their interest in the land. That is because of the doctrine I have referred to in para [25] above.

...

[45] The effect of the conclusions expressed above is that the fixtures on the property ceased to belong to the defendant after the date when the plaintiffs acquired the freehold title to the property. Because the defendant's claim relates to the point after which the plaintiffs acquired title to the property from which time they were entitled to possession, the claim has no basis and could not succeed.

36. The principles enunciated in *Cockrell v Ward* are consistent with the definition of "land" and "improvements" in the Land Leases Act. As explained in *Cockrell v Ward*, the practical consequence of a chattel becoming a fixture is that property to the chattel will, by operation of law pass from the owner of the chattel to the owner of the land. As was said in *Elitestone Ltd*, if a structure can only be enjoyed in situ, there is at least a strong inference is that the purpose is for it to become part of the realty.
37. Mr Arnhambat's claim for compensation can only be based on a view that all the buildings remain the personal property of whoever built the dwellings and are not fixtures. The valuation obtained by Mr Arnhambat is helpful because it indicates that apart from one temporary structure, the buildings are described as "semi permanent" or "permanent", although what the valuer means by "semi permanent" is not evident from the report. To succeed in the counterclaim, Defendants will need to establish that the various buildings are their personal property and are not so attached to the land that they cannot be taken down and re-erected elsewhere. Based on the valuation report, that may be very difficult.
38. I acknowledge that a cautious approach to a summary judgment application is required. However, in this case there is no real prospect of the Defendants defending the claim. Bred Bank is entitled to possession of the lease title by virtue of the mortgagee sale orders, as discussed above. The bank has served a notice requiring the adults occupying the lease title to vacate the property and the Defendants have not done so. Therefore, the Defendants are trespassers, and unlawfully occupying the lease title. Once a determination is made that the Defendants are unlawfully occupying the lease title, then an eviction order can be made. Any claim for compensation is a separate issue and is not a precondition to an eviction order being made. And as I have said, it may be very difficult for the Defendants to establish their counterclaim, for the reasons given above.



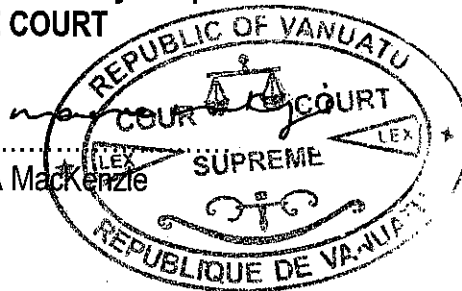
39. For the reasons set out above, I grant the application for summary judgment and make an eviction order. An order for damages cannot be made as there is no evidence upon which the damages may be assessed.⁹

Result and Directions

40. There is an order directing the Defendants to vacate leasehold title 12/0631/345 within 21 days.
41. Costs as agreed or taxed.
42. The counterclaim needs to be heard. I allocate a **conference at 1.30 pm 16 April 2025** to make directions as to how the counterclaim is to be progressed.

**DATED at Port Vila this 10th day of April 2025
BY THE COURT**

Justice M A MacKenzie



⁹ See for example, *Michel v Galinie* [2014] VUCA 33.