Bank of Tonga v Pekipaki & others

Supreme Court, Nuku'alofa
Lewis J
C.175/94

30, 31 August, 2, 5, 6 &7 September 1994, 10 April 1996

Banking - guarantees - service - fiduciary duties
Contract - defences - non est factum - misleading

The plaintiff sued the 3 defendants on their personal guarantees given in relation to lending extended to an incorporated family company.

Held:

1. The giving of proper notice to the defendant in conformity with the guarantee had to be complied with.
2. There had not been proper service of all documents on all three defendants.
3. The defence of a breach of the fiduciary relationship between plaintiff and defendants in that the Bank failed to allow or give an opportunity to the defendants to have proper legal advice failed. No transaction should be set aside on the grounds of undue influence unless it was shown that the transaction was manifestly to the disadvantage of the person subjected to the dominating influence. The notion of undue influence will extend to the relationship of banker and customer but it is not based simply on an inequality of bargaining power. The basis of the principle is not public policy but the need to prevent the victimnisation of one party by another.
4. There was no undue influence by the Bank exerted on the defendant. There was no obligation on the Bank, in the circumstances of the case, to give any advice of a legal nature, or at all. In addition the defendants had the advantage of assistance from their accountant.
5. The defence of unconscionable dealing by the Bank, an equitable remedy, raised on the basis of a claimed false and misleading account to one defendant of the true nature of the dealing, failed. The plaintiff had not failed to exercise due care and reasonable diligence towards the defendants in a situation where there was a need for the lender to exercise due care towards the defendants
6. The plea of non est factum failed (i.e. a claim of a material misleading as to the contents of the signed guarantees the mind not going with the pen).
7. There would be judgment for the plaintiff against the defendants, on the guarantees for which proper notice had been given and served.

Cases considered : National Westminister Bank v Morgan [1985] 1 All ER 821

C.B.A. v Amadio (1982) 151 CLR 447
Hamilton v Watson (1845) 12 Cl. & F.109 (8 Feb 1339)
Curlisle & Cumberland Banking Co. v Bragg [1891] 1 KB 489

Statutes considered — Goods & Services Act 1982 (UK)
Evidence Act s.8(n)
Civil Law Act s.4
Unfair Contracts Terms Act 1977 (UK)

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Counsel for plaintiff : Mr Appleby
Counsel for defendants : Mr C. Edwards

Judgment

PREAMBLE

This action is a sequel to a judgment delivered by Dalgety J. as he then was in action No.515/1992 which in a preliminary way dealt with the demand made by the Bank on guarantors (the defendants both in action 515/92 and in this action).

The plaintiff is a banker. The defendants, Kelepi Toutai Pekipaki until his death, 'Ofa his wife and Hale his son, were at all material times after 16 May 1985, Directors and Shareholders of an incorporated family company known as the "O.K. TOUTAI COMPANY LIMITED" which conducted a business retailing (general) merchandise.

The family business had arranged certain overdraft facilities and a letter of credit for stock purchasing purposes. The overdraft was extended by letter of credit arranged with the plaintiff by a term loan. After the business became incorporated the plaintiff required that the defendants enter personal guarantees in order to secure the extended arrangements. The defendant executed the documents presented to them. It is from the execution and its circumstances from which the issues in the main arise in this case.

Later the trading of the corporation did not enable it to pay its debts. A Receiver was appointed in 1992 by the plaintiff. The plaintiff thereafter instituted proceedings against the three defendants in action No.515/92. The action was based upon the personal liability of the defendants under the guarantees they gave to the plaintiff.

Action 515/92 failed before Dalgety J. for reasons which he published on 12 July 1993, leaving a counterclaim made by the three defendants still to be heard. The claim was struck on the technical ground that notices of demand made by the plaintiff banker were not properly signed.

The present action commenced by the plaintiff in 1994 seeks to enforce the same guarantees this time alleging proper notice and service upon the guarantors. Counsel agreed that this trial may proceed on the basis of the law set out by Dalgety J. in his reasons of 12 July 1993 in action No.515/92. So it has proceeded.

In the time between the conclusion of action 515/92 and the present, the third defendant died. This action is being defended by the administratrix of his estate. The issue are considerably narrowed in thsi action. Some are issues of fact and some are of law.

NOTICE UNDER CLAUSE 20 OF THE GUARANTEE

Dalgety J concluded that before any action could be taken by the plaintiff bank to enforce the personal guarantees alleged to have been made by the defendants, an essential condition for the commencement of litigation, namely the giving of proper notice in conformity with the guarantee had not been complied with and dismissed that action giving leave to the plaintiff to commence fresh proceedings after the necessary formalities were completed i.e. notice in writing to the guarantors by the plaintiff.

The case for the plaintiff bank in this action is that it has now properly completed the giving of notice under the guarantees, has effected proper service and seeks judgment on the action on the guarantees.

Proper service of the notices is disputed by the defendants. As can be seen from the guarantee (Exhibit P1), proper service of notice pursuant to the guarantees is crucial to the success of the plaintiff bank in these proceedings.

The clause of Exhibit P1 which is material to service is clause 20 and is as follows:-

"20. That any demand to be made upon or any notice to be given to the

guarantor or the debtor by or on behalf of the bank hereunder shall be deemed to be duly made or given if the same be in writing and be signed by for or on behalf of any Manager Deputy Manager Assistant Manager or the Chief Cashier for the time being of the Bank or any branch or any person for the time being acting in any of those capacities and if the same be left or sent through the post in a pre-paid envelope or wrapper addressed to the guarantor or the debtors as the case may be at the usual place of abode or business or the registered office of the guarantor or debtors as the case may be last known as such by the person signing such demand or notice or to be delievered personally to the guarantor or debtor as the case may be or advertised in the government gazette of the state country or place in which the guarantee is executed and any such mode of service shall in all respects be valid and effectual notwithstanding that at the date of such service the guarantor or the debtor as the case may be at the time when the envelope or wrapper containing such demand or notice would in the ordinary course of post have reached the address to which it was posted and notwithstanding that it may never do so or if advertised upon the date of publication of the said gazette." - (my emphasis).

The evidence is that the Kingdom has no orderly system of attaching addresses to premises, especially in rural areas. The Bank often resorts tothe use of radio broadcasts to inform customers and presumably others of some fact about which the customer has a need to know. The guarantee ensures that proper service is not only done with care, but is a pre-requisite to any action based upon the guarantee.

Clause 20 of the guarantee is interpolated into the documents which comprises exhibit P2. The documents are entitled - "Certificate of indebtedness .... demand for payment." The demands are addressed to each defendant except in the case of the late Kelepi Toutai Pekipaki where it refers to him personally and not to his estate. Each Defendant is described as being of "Nuku'alofa Tonga." The sum demanded in each notice is the same - namely, $48,383.79. Each notice is dated 10 August 1993.

What should be the simplest task in this action has become one of the most difficult to resolve by reason of the confusion of the evidence of the Clerks concerning service. Then there is the puzzle of exhibit D11 - The returns from service on 10 August endorsed by the Bank officers who effected service. In the exhibit there are only 5 documents. There should be 6 on any account of things.

On the balance of probabilities I am unable to conclude that there has been proper service of all documents on all three defendants. Even on the plaintiff's account, 'Ofa and Hale received only one notice each relating to the loan account if D11 is to be accepted and Kelepi got three notices of demand.

On the question of service of notices P1 is explicit and pedantic. The service must be done in respect of both guarantor and debtor - it does not discriminate - and it must accord with the prescribed (and agreed) manner set out in Clause 20 of P1. From the whole of the evidence I am unable to conclude that the demands have been properly served.

I find that D11 suggests that the following service was effected:-

- Kelepi - received 3 notices demanding T$167,051.30 and T$48,383.79
- 'Ofa - received one notice for T$48,383.79

Hale - received one notice for T$48,383.79

If one accepts the Toutai Pekipaki's then proper service of only some documents was effected. If one accepts Mele everything was done in accord with the guarantee Clause 20. If one accepts Nora Fatai then she is quite uncertain about just which notices were served and on whom. I am prepared to find that there were indeed two visits by the Bank Officers which accords with the evidence of Nora and 'Ofa.

I find that on the first visit 'Ofa received the loan account demand for T$48,383.79. I find that on the second visit no documents were handed out to each defendant by reason of the agitation of Kelepi. The documents were simply left somewhere near Kelepi, which in my view amounts to compliance with clause 20 of P1 of some documents - which ones? In my opinion those in exhibit D11.

The Bank Officers took their leave. I accept that Kelepi saw Ms. Tonga his Solicitor and left exhibit D11 with her and that he left what had been taken to the Toutai household by Mele and Nora, namely the five documents in Exh.D11 and no more.

FORMAL FINDINGS

I make the following preliminary formal findings. I am satisfied on the balance of probabilities from the whole of the evidence that at all material times:-

- The first and third defendants and Kelepi Toutai Pekipaki were directors of the O.K. Toutai Company Limited ("The Company") duly incorporated under the laws of Tonga with its head office at Nuku'alofa.
- On 28 November 1986 the plaintiff at the request of the company lent the company top $50,000 with interest at 10% for the purpose of business.
- On 28 November 1986 the company received the load funds by way of overdraft facilities to a limit of $50,000 and on 15 June 1987 the overdraft limit was raised to $60,000 with interest chargeable at the current rate and again on 15 July 1987 overdraft limit was increased to $100,000 with interest chargeable at the current rate.
- On 17 June 1992 the balance of the loan account which was given the account No.0119101001012 was in arrears and the amount of $139,043.45 including all loan establishment and service fees remained due and unpaid.
- On 3 November 1985 an equitable mortgage was duly executed by the company in favour of the plaintiff to secure all monies then or thereafter becoming due and owing to the plaintiff by reason of the overdraft facility and on 27 January 1986 a certificate of document was issued by the registrar of companies certifying that the equitable mortgage was registered pursuant to rule 14 of the company rules.
- On 3 December 1985 the defendants and each of them executed a personal guarantee with the plaintiff guaranteeing the repayment to the company pursuant to paragraph (A) of the guarantee which provided and provides as follows:-

> "In consideration of the Bank of Tonga (hereinafter called "The Bank") at the request of each of the persons undersigned (which request is testified respectively by their execution hereof) (sic) continuing at its discretion and during its pleasure or accommodation already granted ..... O.K. Toutai Company Limited (hereinafter called "The Debtor") ..... 'Ofa Toutai Pekipaki, Kelepi Toutai Pekipaki, and Sione Hale

Pekipaki, all directors of the said Company (hereinafter called "The Guarantor") hereby guarantees to the Bank the payment when demanded in writing from the guarantor of:

(A) All monies already advanced or paid or now or hereafter advanced or paid by the Bank to or for the accommodation of or on behalf of the debtor either alone or jointly."

- Paragraph 5 of the guarantee document provides that the guarantee is enforceable notwithstanding that any other instrument of security remains outstanding and is a principal obligation and independent of any other security which the plaintiff may hold for any indebtedness of the debtor O.K. Toutai Company Limited.
- Paragraph 7 of the guarantee document provides that the guarantee shall not affect or be affected by any other security held by the plaintiff.
- On 16 June 1987 the plaintiff at the request of the company lent the company $85,000 charging interest at 10% per annum for the purpose of the company purchasing the Burns Philp Company at Ha'apai.
- On 16 June 1987 the company received the said $85,000 loan funds.
- On 18 November 1988 a mortgage by way of lease was executed by the company in favour of the plaintiff to secure all monies then or thereafter becoming owing to the plaintiff.
- On 17 June 1992 the balance of the loan account No.01101010111011 was in arrears and the amount of $42,010.41 which included a number of loan and establishment fees remaining due and unpaid.
- On 13 May 1992 the plaintiff caused a receiver to be appointed pursuant to the equitable mortgage in order to secure repayment of the total debt owed to the plaintiff in the amount of $181,053.86.
- On 10 August 1993 the plaintiff sent a letter to the defendants making a demand for payment pursuant to the personal guarantee.
- On 23 July 1992 an administration order was granted by the Supreme Court and an administrator was appointed to manage the affairs of the company pursuant to a petition for an administration order for the admitted purpose of achieving a better realisation of assets than would be available upon a winding up of the company.
- Letters of administration were granted in respect of the estate of Kelepi Toutai Pekipaki on 9 December 1993.

THE DEFENCES WHICH ARE FOURFOLD

1. The defence of breached special fiduciary relationship between the plaintiff and the defendants in failing to provide an opportunity for the defendants to have independent legal advice concerning their rights and obligations under the guarantee.
2. The defence of failure on the part of the plaintiff to exercise proper skill and care toward the defendants in that they had duty to do so arising from an implied term under the provisions of the supply of Goods and Services Act 1982 s.13 an English statute of general application.
3. A failure by the plaintiff to apply the sum of $100,000 in reduction of amounts owed to the plaintiff by the company, being a sum which was the proceeds of the sale of leasehold property owned by the company at Ha'apai by the plaintiff in June 1993

and in so doing the plaintiff wrongly relies on clauses of the guarantee referred to in 6,7 and 8 of the statement of claim namely that it can sue and claim from the defendants on the deed of guarantee without reference to any instrument of security which the plaintiff may hold for the indebtedness of the company.

4. The defence of non est factum.

DEALING WITH THE DEFENCES IN TURN

1. THE DEFENCE OF FIDUCIARY RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANTS IN THIS CASE BREACHED BY THE PLAINTIFF IN THAT IT FAILED TO ALLOW OR FAILED TO GIVE AN OPPORTUNITY TO THE DEFENDANTS TO HAVE PROPER LEGAL ADVICE.

In National Westminster Bank PLC v Morgan [1985] 1 All ER (HL) 821 the House of Lords held that no transaction could be set aside on the grounds of undue influence unless it was shown that the transaction was manifestly to the disadvantage of the person subjected to the dominating influence. The notion of undue influence will extend to the relationship of Banker and customer but it is not based simply on an inequality of bargaining power. The basis of the principle is not public policy but the need to prevent the victimisation of one party by another.

I find that there was no undue influence by the Bank exerted on the Defendants. There was not a suggestion in cross examination that the Plaintiff even discussed the matter of legal adivce or representation. And in my opinion there was no obligation on the Plaintiff Banker in the circumstances of this case to give any advice of a legal nature or at all.

I am satisfied that the documents were all explained briefly broadly but perhaps in adequately for any profound understanding on the part of the Toutai Pekipakis, by the Bank through its officer Tu'ipulotu and in the presence of the lending manager. I think it inherently improbable that the Toutai Pekipakis misunderstood what was told them.

'Ofa Tu'ipulotu had, just over a week later certified that the guarantee had been explained to them and they appeared to understand the nature of the document and they had signed it of their own free will.

There is nothing about the evidence in this case that would suggest that the lending Plaintiff Bank was engaging in anything but a needs based lending to a corporation which needed further advances a condition of which was that loans by way of an overdraft and a term loan would be guaranteed by the directors.

In the Commercial Bank of Australia Limited v Amadio (1982-1983) 151 CLR 447 at 480 per Deane J. the Plaintiff was dealing with aged parents of the borrower. The aged parents were to a large extent relying upon the accuracy of information being supplied to them by the borrower on the one had and the lender Bank on the other. In the present case the people from whom the Bank was seeking surety, the Defendants, were the life and soul of the very company in respect of whom the Bank would lend and the Defendant sureties would guarantee. It was the decision of the Defendants themselves (on the advice of their accountant Kelepi Tupou) that they incorporate the family business. It may be that the language of the documents was not the native tongue of the sureties. Even if it had been in my opinion the Defendants cannot now be heard to complain of their lack of understanding by reason of the failure or misstatement of the Plaintiff Bank to completely describe the

nature and extent of the legal liability created by the documents in the Defendants. In addition it is evident that, whenever they were actually singed, the Defendants had the advantage of assistance from their accountant, Kelepi Tupou.

2. THE ALLEGED FAILURE BY THE PLAINTIFF TO FULFIL THE DUTY TO EXERCISE PROPER CARE AND SKILL BY NOT EXPLAINING THE DEED OF GUARANTEE TO THE DEFENDANTS

I take the law to be as presently advised on this question that a contract of guarantee is not *uberrimae fidei* - of the utmost good faith. The principles governing the extent to which a creditor is bound to make disclosure to a surety were cited in Hamilton v Watson (1845) 12 CI. & F. 109 8 E.R. 1339

"Relief against unconscionable dealing is purely an equitable remedy. The concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing ...." Commercial Bank of Australia Limited v Amadio [page 10 infra]

The defence raised here is plainly equitable. The complaint is that the only explanation of the true nature of the dealing proferred was to 'Ofa and that was false and misleading on the account given by both Hale and 'Ofa. 'Ofa says:-

> "I had to go and sign something at the Bank ...we were contacted to go....we met 'Ofa (Tu'ipulotu) we were given many documents to sign....'Ofa was by herself when we went there to the Bank....'Ofa gave us the documents.....I can't read English and the documents.....I can't read English and the document was explained as meaning that the loan would not be registered in my name.....it was never read to me.....I said what's it all about?....She said its O.K. its a company to be registered.....converted to me to be registered to me.....Its a good document to sign.....I trusted the Bank."

The witness 'Ofa Toutai then identified her signature on exhibits P1 and P4 (both in the English language) as bearing her signature and being her signature and being dated the 3 December 1985.

Some of the assertions 'Ofa Toutai says were made to her by 'Ofa Tu'ipulotu were put to the witness 'Ofa Tu'ipulotu by counsel for the Defendants. 'Ofa Tu'ipulotu's evidence is that the Bank policy of the day was that:-

> "We had to explain to customers about conditions attaching to the guarantee ..... that they were responsible for the liabilities of the company that if the company fails to pay then the Bank can demand that they repay for the liabilities that guarantee was containing (sic)"

The witness 'Ofa Tu'ipulotu said in cross examination:-

> "I can't remember whether the document was explained to them ..... the diary note (D6) was shown to me one week later ..... it took that long to reach me".

The witness Tu'ipulotu agreed that there was (and is) no Tongan word for the English word "guarantee". (Matoto says that there is no exact word for guarantee but that it can be translated as "Malu'i" - "providing protection or insurance to protect physically.") That prior to these events she had not read the guarantee document, since that she has read it and concedes that it is a difficult document to read and understand even with a good education, that knowing 'Ofa Toutai the witness had

no idea if (at the material time) 'Ofa Toutai could read and understand the document exhibit P1 (the guarantee) and that she was unable at this distance in time from the events under consideration to remember whether the guarantee and the equitable mortgage were executed at the Bank premises or at the offices of Kelepi Tupou, the accountant for the Toutai's.

I consider 'Ofa Tu'ipulotu to have been a truthful witness. Her evidence in part however is probably unreliably by virtue of the passage of time about some matters in respect of which she testified.

I find that 'Ofa Tu'ipulotu was being truthful about the matters to which she deposed in a positive way. Her evidence is that she is now unable to recall whether she "Explained the document to them". And that it was a week later when she saw and signed the diary entry D6.

D6 among other things contains a "Certificate" which certified the following:-

> "11/12/85 O.K. TOUTAI & CO LTD
>
> We certify that 'Ofa Toutai Pekipaki, Kelepi Toutai Pekipaki and Sione Hale Pekipaki signed a guarantee for D & 1 in favour of O.K. Toutai and Company Ltd.
>
> The document was fully explained to them and they appeared to understand the nature of the document.
>
> They signed on (sic) their own free will.
>
> (Sgd.) 'O. Tu'ipulotu
> 'O. Tu'ipulotu

Just who was present at the execution of the documents and where did it take place? 'Ofa Toutai Pekipaki says at the Bank premises and 'Ofa was there. Hale says both 'Ofa Toutai Pekipaki and 'Ofa Tu'ipulotu and Kelepi Toutai were present and it was done at the Bank.

'Ofa Tu'ipulotu says that P1 was signed "In the bosses office" then in cross-examination when it was suggested that P1 (the guarantee) was signed in the office of Kelepi Tupou the accountant, 'Ofa said "I don't know". Later in cross-examination Mr Edwards put to 'Ofa Tu'ipulotu "the Toutai Pekipaki were in the Bank with you for less than ten minutes" - (which is seemingly and unexplainedly at odds with his earlier suggestion that it was at Kelepi Tupou's office and utterly inconsistent with his clients' own evidence).

I find on the balance of probabilities that those present at the execution of exhibits P1 and P4 and indeed all the documents signed on the 3 December 1985 were 'Ofa Toutai Pekipaki, Kelepi Toutai Pekipaki, Hale Toutai Pekipaki, the witness 'Ofa Tu'ipulotu and the then Loans Manager of the Bank of Tonga. I find that the execution of the documents took place in the office of the Loans Manager of the Plaintiff Bank.

There is no evidence about the General Manager Treloar and his whereabouts now or in 1985 or why the witness Matoto signed for him in D6 on 11/12/85. If there was a persisting objection to the admissibility of exhibit D6 it would be necessary to prove (pursuant to the provisions of the Evidence Act cap 15 section 89(n)(1)(ii) among other things that, the Manager Treloar was:-

- Dead or
- Beyond the seas or unfit .....

- or cannot ..... be found.

Since the document D6 was admitted by and at the request of the defence and came from the possession of the plaintiff it is unecessary for such a finding to be made. D6 persuades me (that although the witness Tu'ipulotu cannot now remember whether she explained the documents P1 and P4 to the Toutai Pekipakis,) that she probably did so explain the documents to them. What the nature and extent of her explanation was, cannot now be gauged at this distance from the event.

The evidence concerning this aspect of the claim must be understood against the background of the Defendants themselves. The guarantors, none of them, were inexperienced in business. The family was relatively sophisticated in commerical matters. Matoto, the lending manager of the Plaintiff referred to the meetings and consultations he had with the defendants.

The tenor of the evidence is that the business grew up from small origins largely due to the acumen and hard work of the three guarantors. It was not as though they were young inexperienced first borrowers alone in the presence of an unconscionable lending institution. The Defendants each must have known that if the company was to secure further borrowings then they would be required to assume some responsibility themselves as individuals. I do not accept that from the whole of the evidence that the Plaintiff failed to exercise due diligence.

I find that although the relationship was one in which there is a need for the lender to exercise due care toward the borrower, there is nothing in the evidence which would lead this court to conclude that the Banker did not act with due care and reasonable diligence toward the defendants. The ground fails.

3 FAILURE ON THE PART OF THE PLAINTIFF TO APPLY THE SUM OF $100,000 IN REDUCTION OF THE OVERALL DEBT.

The defence is not tenable. There is no counterclaim or set-off pleaded by the defendants. The applying of sums in reduction is a matter of set-off. The explanation given by the plaintiff witness Matoto is that the sum of $100,000 received by the administrator appointed by the Bank, being the proceeds of sale of the Ha'apai asset of the defendant company, was held by and applied by the administrator of the company in discharge of indebtedness to preferential creditors of the company together with other sums from the realisation of other company assets.

The Defence seeks to rely on the provisions to the Unfair Contract Terms Act 1977 U.K. by virtue of the provisions of the Civil Law Act Cap 25 Section 4. The defence allege the conduct of the plaintiff amounts to unfair and/or unreasonable conduct by virtue of the reliance of the plaintiff on the deed of guarantee and on paragraph 6, 7 and 8 of the statement of claim together with the fact that the Bank is withholding payment of the money already made by the purchasers of the Ha'apai property.

It seems that preferential creditors have been paid by the administrator, if one accepts the unchallenged evidence of the witness Matoto, using the $100,000 proceeds of the sale. The Bank has no control over the actions of the administrator - a Court controlled entity. After the conclusion of these proceedings the administrator will no doubt seek directions from this Court as to further distribution concerning the administration. But these proceedings are not concerned with the administration of the company, these proceedings are an action on the guarantees of the defendants.

Neither the administrator nor the company are privy to this claim which is brought by the Bank on guarantees made by the defendants. This head of defence fails.

4. NON EST FACTUM

In general terms a peson who signs a document is bound by its contents even though he did not read it or he did read it but did not understand it at the time. The law does not allow a person to deny the effect of a deed he or she has executed. However the law sensibly allows that where for example a blind person is induced to execute a document which is misleadingly read to that person so that the understanding the blind person is left with makes the document out to be something which it is not, then he or she is not bound by signing it. It is a nullity. He or She may truly say it is not my deed "non est factum".

In Carlisle and Cumberland Banking Co. v Bragg [1891] 1 K.B. 489 C.A., Per Buckley L.J. at 495 Buckley L.J. said,

> "The true way of ascertaining whether a deed is a man's deed is to see whether he attached his signature with the intention that that which proceeded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains; he may have been content to make it his act and deed whatever it contained ..... if on the other hand, he is materially misled as to the contents of the documents, then his mind does not go with his pen. In that case it is not his deed".

The document may have been in Tongan but there is no evidence of misleading by the Bank Officers in charge of the transactions. It cannot be said that any of the defendants were misled in my opinion, materially or at all. The plea of non est factum fails.

CONCLUSION

From the whole of the evidence I am satisfied that the Plaintiff Bank has established that the Defendants are liable under the guarantee in each case. But what of the service of notice requirements under the provisions of exhibit P1 Clause 20?

In my opinion proper service was effected on the following Defendants in the following ways:-

- The First Defendant	-	Proper service under the guarantee The loan account $48,388.79
- The Second Defendant	-	Proper service under the guarantee The loan account $48,388.79 and the The overdraft facility $167,051.30
- The Third Defendant	-	Proper service under the guarantee The loan account $48,388.79.

Accordingly there will be Judgment for the Plaintiff on the claim against the First Second and Third Defendants in the sum of $48,388. 79 plus interest at the rate of 13.5% per annum from the date of the guarantee namely the 3rd day of December 1985 until paid.

In addition, there will be judgment for the Plaintiff on the claim against the Second Defendant in the sum of $167,051.30 plus interest at the rate of 13.5% from the 3rd day of December 1985 until paid.

The costs of this actions to be those of the Plaintiff to be taxed or agreed.