Bank of Tonga v Peacock & Peacock

Supreme Court, Neiafu, Vava'u
Hampton CJ
C.500/94

29, 30 April, 1, 2, 3, 6, 7, 10, 16 May, 28 June 1996

Banking - due diligence - breach - duty of care - damages
Damages - defamation - trespass - assault
Land - mortgages - growing crops
Contract - consideration - forbearance
Defamation - damages - no loss proved
Assault - damages
Trespass to goods - damages

The plaintiff sued for amounts owing on 2 bank accounts; the defendants reponded with a series of 6 counterclaims based on negligence, negligent mis-statements or misrepresentations, breach of contract and/or negligent statements, defamation, trespass to goods and trespass (assault) to person.

Held:

1. The bank was entitled to judgment of the marketing account and even if additional clauses were read into the lending contract demand was able to be made, as it was, and the defendants were liable. There was good consideration for the agreement; the plaintiff would forbear from making demand and executing on the securities.
2. A defence under s.16 Land Act of illegality was rejected as not applying to the first defendant (a non-Tongan whose crops were part of the security, and in any event doubt expressed whether the word "stock" in context in the agreement referred to growing crops, but rather harvested crops).
3. The bank was entitled to judgment on the other account. There was no basis for the claim of coercion as the agreed compromise (the basis for suing) was first suggested by the defendants themselves about a year before the agreement.
4. There was no basis either for the counterclaims of negligence relating to the management of that account; or for the counterclaims of negligent mis-statements and/or mispresentation by the bank leading to further borrowing by the the defendants on the first (marketing) account. This latter was fanciful hindsight.
5. If an institution provides finance for a client's claimed purpose that does not make the institution a party to and/or a guarantor of that purpose.
6. The counterclaim based on the (authorised by the defendants) cross credit checks between the plaintiff and another bank, who also leant to the defendants

also failed. Factually what was said was accurate, repeated what had been said before and, if the claim was in defamation, was privileged in the circumstances and not actuated by malice. In any event the defendants got their loan there was no damage.

7. The counterclaims for the plaintiffs statements and advertising when taking steps to make demand on the loan and execute on or take possession of secured chattels were based on breach of contract, breach of a claimed duty of care and defamation.

8. The plaintiff's servants unduly and unnecessarily panicked and rash and inappropriate actions followed, with a lack of due diligence, a failure to exercise a reasonable standard of care (over identifying secured items, advertising and of taking or trying to seize chattels) in circumstances where the bank owed duties of care to the defendants.

9. Some words spoken in instance were defamatory but did not fall within any of the categories in s.16 Defamation Act and no evidence was called as to monetary or other loss.

10. In the circumstances total damages of $1100 were awarded for the breaches of duties of care in relation to advertisements. The advertisements were as well defamatory contained incorrect details, were not warranted in the circumstances and not privileged, but here s.16 applied and no proof of loss was required. Damages of $7000 were awarded.

11. Trespass to goods did occur by the bank seizing goods which were not, and never were, secured. Due diligence was not exercised. Damages totalling $1500 were awarded.

12. As to the assault (trespass to person) force was used on the the first defendant by the plaintiff's emloyees to take possession of a tractor which was not, and never was, secured. Damages of $1000, to the first defendant only, were awarded.

13. Orders were also made in favour of the plaintiff for possession of certain secured chattels and funds; but the plaintiffs application for an order securing to it certain leasehold lands was rejected - the actual security was a "pledging" of the "registered mortgage" (not the lease or land); the bank has powers under the mortgage; and the matter was one for the Land Court (which has exclusive jurisdiction) in any event. The plaintiff had rights under s.109 Land Act.

Cases considered : Tu'ipulotu v Fau (Dalgety J 3/12/93 L.134/93)

Statutes considered : Defamation Act
Evidence Act s.80
Land Act ss.109, 149, 16

Cousel for plaintiffs : Mr Appleby & Ms Osmundsen
Counsel for defendants : Mr Tu'utafaiva & Mr Piukala

Judgment

General

On 24 May 1994 in scenes which might have served well in any cinematic farce the First Defendant and the Vava'u Branch Manager of the Plaintiff met and confronted each other, over a tractor, on the road from Longomapu to Neiafu. Farcical it may have been; unedifying from any one's point of view it certainly was.

Unfortunately it led to an hardening of attitudes by both Plaintiff and Defendants and to the issue of these proceedings within a week or so with all the resultant interim injunctions and other interlocutory orders and much protraction and delay. One suspects that if that confrontation on the road from Longomapu had not taken place, this action and all that it has come to mean and represent, particularly in the First Defendant's mind, well might not have resulted.

Basically there are 2 claims by the Plaintiff against the Defendants; and 6 counterclaims by the Defendants against the Plaintiff. I will deal with each of the claims and the counter claims and the defences with respect to each in this order.

i. Plaintiff's claim - Peacock Marketing account
ii. Plaintiff's claim - Nua/Peacock account
iii. Defendants' counter claim - Nua/Peacock account
iv. Defendants' counter claim - "Agricultural lending programme"
v. Defendants' counter claim - Tonga Development Bank
vi. Defendants' counter claim - Plaintiff's advertisements and statements
vii. Defendants' counter claim - trespass to goods
viii. Defendants' counter claim - trespass to person - assault on First Defendant.

The narrative which follows expresses my findings of fact on the evidence which has been presented to me. There are some 300 pages of agreed documentary exhibits and I have heard some 15 witnesses. (When I refer to the documents as agreed I mean that these documents were accepted in Court, by agreement of the parties, without the need for formal production and as being available as evidence before me). I also add that, particularly with events of some years ago, I find that the documents, especially as to the history of the Plaintiff's banking relationship with the Defendants, are generally more reliable than human memories affected, as I find they have been, by later events.

Claim Peacock Marketing Account

I intend giving an history of matters leading up to the borrowing of the Defendants from the Plaintiff which culminated, ultimately, in the May 1994 events. (The long factual narrative is omitted here).

I find that there was good and valid consideration for this loan agreement. This long running and often extended (in amount and in term) overdraft had been repayable on demand, explicitly in termsof the loan agreements of June 1991 and March 1992, since the overdraft limit went from $20,000 to $60,000. In addition the previous agreement of March 1992 (Exh. p 190) was "to be reviewed by 31/7/92". That time had passed. The Defendants still wanted and required the overdraft facility; the Plaintiff would not call up the advance - would forbear from making demand and/or executing on (taking possession of) securities and would continue the advance or overdraft facilities. The First Defendant in evidence said, in acknowledging the debt, that it was never the Defendants intention not to pay off the overdraft but the May 1994 events supervened and made things impossible in effect for the Defendants.

I have given a comprehensive history (and that is helpful and will shorten my consideration of some of the other heads of claim and counter claim). I did not want to leave any stone unturned. I think I have not. But on this part of the claim I can see no defence. Even if (and it is a very big if indeed) but even if the First Defendant's additional clause at Exh. p173a is read into the agreement of 20 August 1992 (Exh. p 204), and I do not see how it can be, but presumably in some way through the additional clause in the offer letter at Exh. p 201 a (para. 55 above) - then on the evidence it is very clear that at the time of demand (and whether in May 1994 or March 1994 or earlier) (a) the Defendants were "not operating the Peacock Marketing Account at all, let alone satisfactorily if that is how the clause should be read; and (b) the business was "not performing satisfactorily".

Demand was able to be made; the Defendants jointly and severally are liable to the Plaintiff on the overdraft account and pursuant to the loan agreement of 20 August 1992.

That deals with the defences raised by Mr. Tu'utafaiva. Quantum is I believe quite straight forward (subject only to any matter as to the unauthorised "ULFs" - see para.46 above and paras. 40 - 42 of the amended Statement of Defence - an arithmetical exercise involving deductions, to be made, and recomputation of interest) - and is shown to be, under this head $96,069.61 as at 31 March 1996. I add that no items "pledged as security" have in fact been taken into the Plaintiff's possession or realised on in any way.

The only other defences raised in the amended statement of defence (para.31), and not mentioned by Mr. Tu'utafaiva, are a claim that the loan agreements are "void and of no effect". On quite what basis I do not know. I reject that defence. The para.31 goes on: "Further the Defendants plead s.16 of the Land Act of Tonga as a defence". That is a claim of illegality - a Tongan subject cannot (on pain of criminal penalty - imprisonment and or fine) pledge or charge growing crops.

This then is directed at the security provision in the 20 August 1994 loan agreement: "Loan agreements charging over ... plantation stock and frozen goods". I am not persuaded at all that those words in the context of this agreement and in the light of the Land Act section mean growing crops of e.g. vanilla or manioke or anything else. Stock is not a word appropriate to describe crops. Stock might well describe crops after harvesting and/or perhaps after some processing. But not whilst growing in the ground (see further para.45 below). So I reject the claim of illegality under the Land Act. That may well affect other orders sought by the Plaintiff and certain interim injunction earlier made but I will come to that in due course.

There are other difficulties in the path of this defence as well. It could only apply to Siusi Peacock - the First Defendant is not a Tongan subject. Yet it is he who has the lease of the relevant land (lease 4883 as claimed under mortgage) and it is only he who has entered into the mortgage. So even if stock included growing crops I am not persuaded on the evidence that such crops were those of the Second Defendant (Siusi Peacock). I add that in any event my view is that this particular limited provision, even if it were illegal (and it is not) would be able to be severed from the rest of the contract and would not render the whole agreement invalid as illegal. It does not go to the heart of the agreement. That defence fails also.

Claim : Nua/Peacock Account

A history is necessary (but not as long, fortunately); the matter seems to go back to about 1985. (A factual account followed, in the judgment).

The result was a proposal in writing (in about May 1992) from the First Defendant (Exh. pp 198-9) offering $5000 by 10 monthly instalments. The Bank moved slowly - and there are not the indications of pressure that the First Defendant now complains of. The Bank did not respond to that proposal (making a counter offer) until 9 December 1992 (Exh. p 218); and then, failing any response, made a further counter offer (in effect accepting the Defendants offer of $5000 by 10 instalments) in March 1993 (see Exh. pp 225, 226). The Defendants both accepted this on 28 April 1993 (Exh. p 228) and I reject a claim of coercoin made by the First Defendant, but not by the Second Defendant. The compromise reached was initially proposed by the First Defendant about a year before; the compromise resulted in the Plaintiff forgoing some $7000 approximately.

The 10 payments were made by automatic transfers from the Defendants' joint personal account, as authorised by both Defendants, between May 1993 and February 1994 (Exh. pp 59-63) leading to difficulties with that account then becoming overdrawn (refer as to that to the correspondence about it at Exh. pp 229-233).

Including unauthorised Limit Fees again, the amount owing as at 31 March 1996 on that personal account of both Defendants is $6314.32 (Exh. pp 281-2 and I note that in those last 2 pages, as with the other business account, no further ULFs are charged). Subject then to ULFs being deducted - no proper authority for such deductions having been proved - the Defendants are jointly and severally liable to the Plaintiff for that sum. Leaving aside any question of a concluded contract (of 28 April 1993 with consideration at the very least with the Second Defendant) both Defendants are liable. They are sued on the overdrawn balance of their Bank Account. They both authorised the deductions from that account.

I reject the Defendants' defence of the Plaintiff being estopped from denying that the debts were entirely Nuas and not the Defendants at all (from the factual account above); and of negligent and/or unlawful conduct (which perhaps goes more to the counter claim).

Counter claim - Nua/Peacock Account

$15,000 is sued for under this head by the Defendants. The allegations are of negligent mismanagement and/or unlawful conduct of the Defendants personal account by the Plaintiff by making or allowing unauthorised deductions therefrom; allowing unauthorised overdrawing to occur; charging unauthorised fees and charges (indeed a claim of a charge of $200 per month for which there is absolutely no evidence anywhere - the ULFs (11 in all from 31/5/93 to 30/4/94) total only some $105.56 or so, and I have dealt with at para.87 above.

Given the factual matters traversed already I reject such allegations. Subject to what I have said as to U.L.Fs the deductions were authorised and lawful. This was a joint account. Both Defendants authorised the deductions and the account going into overdraft. There has been no proof of damage or harm. This part of the counter claim is dismissed.

Counter claim "Agricultural Lending Programme"

Again I believe I have said enough on the way through the history of the Peacock Marketing account to indicate that I find that, factually, there is no substance - and can be no substance legally or factually - to these claims that the Plaintiff "promised" (the word repeatedly used in the pleadings) that it would finance (in some unlimited way, as claimed) the Defendants' farming; that it would provide markets for the Defendants' crops so that they could then repay their loans; that it would finance (again in some unlimited way) "all necessary facets" of the Defendants marketing crops overseas (including a shop

in New Zealand, delivery vehicles, freezers and coolers, shipping finance, crops purchase finance); that it would finance the Defendants and only 2 other persons to market crops in New Zealand.

These claims are wild and extravagant in my view. They have no foundation. I refer to e.g. my comments in e.g. paras 13, 17, 18, 19, 20, 22, 24, 25, 26, 27, 29, 30, 31, 33, 36, 41, 42 and 65 above.

Given the nature of what is claimed by the First Defendant - the "agreements" he had with the Vava'u manager, Mr. 'Ahota'e'iloa, it is extraordinary that there is not one jot of supporting documentation. The First Defendant is an intelligent man; he is and was versed in business and in banking. He entered into all manner of agreements. Yet nothing at all with the Bank on such crucial - such vital to him, his wife, and their business - matters. There is not even any reference to such "promises" or "agreements" in any of the exhibits, let alone the Bank diary notes.

The First Defendant is an articulate man and he can write comprehensive and coherent letters (of complaint if he thinks necessary). He can also "write in" clauses into Bank offers of finance (e.g. Exh. pp 173a, 201a). The nearest thing to a close to contemporaneous complaint by him is in the 2 letters of January 1991 (Exh. pp 160 -2) which come to a claim of a lack of full financial support as "we were assured of". The discussions of the First Defendant with Mr. Schwenke of July 1993 (Exh. pp 230 a - c) are revealing ("Gavin stated that he is suffering as a result of the easy borrowing years in Vava'u and accepts responsibility for his position" - when put to him in evidence he in effect accepted that as the position).

The only documentation the First Defendant points to is the paper of Mr. 'Ahota'e'iloa of May 1988 (Exh. pp 72-77). The paper must be read in its entirety - but it is as it says in the first sentence "The aim of this paper is to explain briefly why Bank of Tonga participated in providing this (Commercial Farming) Finance in Vava'u since 1987". The Bank did move, I find, from traditional housing and personal lending into financing commercial plantation fishing and livestock in Vava'u. But that was all it did. It remained a financier but moved into those sectors. It was not a marketer; it was not a guarantor of markets; it was not an establisher of monopolies in markets overseas (how could it possibly do that latter); it was not, either, an unreserved or unlimited provider of finance.

Undoubtedly the then Vava'u manager was an enthusiast and tried to achieve cooperation between various sectors of the Vava'u community - witness e.g. his diagrams, and comments on Exh. pp 73-4 in the interests of all Vava'u. He did refer to the Bank's financing of this commercial activity as "this Agricultural Lending Programme" (Exh. p 76) but that is as close as it gets (if that can be called close) to the Defendants' claims of the Plaintiff "implementing its agricultural orientated economic development program with the ... first 5 year plan" (amended counter-claim para. 55).

The Defendants called, in support, a witness, Mr. Piu, who claimed to have been similarly "pulled in" to marketing arrangements with the Plaintiff. He said he was to research and then market produce in New Zealand as part of the Bank's project. He spoke of the Bank giving him moneys to undertake the project - or his part in it. Under cross examination it turned out that the "giving" was that he applied for and sometimes obtained loans from the Plaintiff for specific business proposals of his own, which he admitted he saw as opportunities to make moneys for himself and his family (although he seems to have wilfully misled his partner, his uncle). He regarded the business as his own; the

money from the Bank as loans which had to be repaid by him "for sure"; and accepted that the Bank considered each loan application on its individual merits. He now owes moneys to the Plaintiff (on judgment), he has, I believe, an axe of his own to grind and has overstated the position. None of his evidence was put tot he Bank's witnesses. Interestingly his name does not appear in the list of names provided by the Defendants as being the "over 30 people instead of 3 to market in New Zealand" financed by the Plaintiff (para 63 a of amended counter-claim).

In the paper (see paras. 95-96) it is clear that the Plaintiff was only a financier acting within its own normal limits eg. Exh. p 74: "Procedures - These following suggested steps start from the preparation of the proposition to accompany the normal requirements of a Loan Application (Refer to Bank Rules)". There were and are such Rules. Or eg. Exh. p 75: "Bank position is to say "Yes" or "No" in terms of Bank's lending guidelines".

I reject the First Defendant's evidence (as with Mr. Piu's) on this as fanciful hindsight. There is and was no substance to his claims under this head (for a total of some $350,000 I add). There was no such plan or programme as he alleges; there was no withdrawal from or abandonment of such in 1990 as he claims, causing him loss. It is significant that at that claimed time of withdrawal from the programme he had moved of his own volition (and against the Bank's advice/wishes in effect) from exporting crops from Tonga into importing meat into Tonga - and on such a scale as noted earlier in this judgment that most finance from the Bank was being sought for that at this time; and he was prospering by it, he said. Importing meat was never part of the plan or programme, even accepting entirely (which I do not, at all) everything which the First Defendant said about it.

The First Defendant's fundamental misconception, it seems to me, is to say that if an institution provides finance for a client's claimed purpose, that makes the institution a party to and/or a guarantor of that purpose.

Specifically there is no evidence to support the various allegations in paras. 54 to 64 of the amended Statement of Counter-claim. There was no programme or plan as alleged; no promises of unlimited finance, of providing markets; no joining of such a programme in reliance on promises; no failure "to comply" with promises. There was no loss of income proved by the Defendants (generally, let alone specifically arising from claimed breach of promises). There was no "invitation" to establish markets in New Zealand or overseas and no acceptance of such; no "promises and representations" by the Plaintiff; and again no failure to keep promises.

Whatever the actual legal cause (or causes) of action; and Mr. Tu'utafaiva, brought in late as counsel, had difficulty spelling it out initially - though he disclaimed contract and seemed to base himself on negligence (negligent mis-statement and/or misrepresentations) - I find that there is no factual basis for any claim at all. The claims of $100,000 for loss of profits; and $250,000 for "loss of profit, pain and anguish" are dismissed. It may not be insignificant that the original counter claim of 28 June 1994 made no mention of these allegations; nor did the October 1994 amended version (filed just before the first scheduled but absorted trial); they were not made in pleadings until April 1995 - a growth with hindsight.

Counter claim : Tonga Development Bank

This is a claim for $10,000 for in effect the alleged breach of a claimed duty by the Plaintiff to take care when making a credit report to the TDB, on the Defendants, in

September 1992.

There was a long history of cross credit checks between the 2 Banks, both of whom were lenders to the Defendants. Examples of such are found throughout the Exhibits. Such checks were done with the written authority of the Defendants.

The one complained of in the pleadings (counter claim paras. 66-68) is to be found at Exh. p. 212. Mr. Langa'oi described it's making in evidence. I find that the figures used in it were accurate and the added on interest (for 1 year) acceptable and as had been done in the past.

There was a comment of "unsatisfactory" in relation to the business loan, which involved a small sum compared with the overdraft. I find that the use of that word in relation to that term loan, was appropriate given the then history and situation of the loan i.e. in arrears by some $4,000. The Plaintiff had a duty to the TDB to report accurately and with care. It did so, I find. There was no overstating or falsity as alleged, let alone malice on the part of the Plaintiff. Indeed the complained of report reflects exactly the previous May 1992 report (Exh. p. 196) to the TDB; the only "adverse" comment there being as to the term loan - again an "unsatisfactory" for the overdraft account even though it showed that account was over its limit.

The Defendants complain that this credit check of September 1992 prevented them then getting finance (counter claim para.69). In fact that is not true. The credit check was in relation to the possible further TDB loan which was granted to the Defendants - see the TDB loan agreement Exh. pp 212 a-c of 8 September 1992 (and the then TDB manager in evidence confirmed that this loan was granted).

So what was stated was true and accurate, I find. It was indeed in privileged circumstances (if in fact this is a defamation pleading - which Mr.Tu'utafaiva said it was not); it was not actuated by malice; the Defendants still got their loan; there was no damage or other consequences to them (and certainly no evidence to substantiate the claims in para.70 of the counter claim). There was no "unlawful conduct" - as claimed, and however that is founded (which I am left uncertain about).

I reject any claim to amend the counter claim to allege similar things about another later (but ill defined as to quite when) report by the Plaintiff to the T.D.B. This was first raised by the First Defendant in his evidence, when he saw the problems with this September 1992 position and referred to a March 1993 event. No such March 1993 documents have been produced. In para. 68B of the counter claim there is detailed reference to the TDB manager and what was alleged to have been said to him by the Plaintiff's then Vava'u manager. The T.D.B. manager was called and gave evidence for the Defendants. He did not give evidence which accorded with para.68B - in fact did not touch on that aspect at all. That 'witness referred to a loan application made by the Defendants to the T.D.B. about May 1994 (see the credit check at Exh. p 256) when because of the unsatisfactory credit reference from the Plaintiff the further loan request was refused. By then relations between the Defendants and the Plaintiff were at flash point.

The First Defendant himself had control of these pleadings at various stages and in particular when the counter claim was put, roughly, in it's present form. I would not allow such a late amendment in these circumstances even if one had been applied for - it has not.

This claim is rejected.

Counter claim - Plaintiff's advertisement & Statements

We now come to the events of May 1994. The first head in this part is a claim for $30,000 for advertisements and statements said to be in breach of contract or rather, as I have heard the evidence, a claim arising from an alleged breach of a claimed duty of care that the Plaintiff owed the Defendants as borrowers from it under the loan agreements and in 1 instance in particular, said to be defamatory - (paras. 72 - 80 and 83 - 84 of the counter claim). The second head is a claim for (or rather as part of a claim for) $150,000 for defamation arising from some of the same advertisements (paras. 91 - 94 of the counter claim).

I find that the Plaintiff, through its servants, unduly and unnecessarily panicked in May 1994. Without good grounds, and without proper checks being carried out, its servants convinced themselves that the Defendants were selling up and leaving the jurisdiction. This was not so. The First Defendant did intend going back to the U.S.A. as he had been doing (and as the Plaintiff knew see diary note of 17 May 1994 at Exh. p 245) for some little time past. But the Plaintiff's servants convinced themselves that matters were far more sinister. Rash and inappropriate actions followed. As the General Manager of the Plaintiff candidly said - there was a lack of due diligence in various respects, by Bank Officers, through this time. A failure to exercise a reasonable standard of care (as I say in various respects - over identifying secured items, in care over advertising, in physically taking or trying to take chattels; and as I will come to); in circumstances where I find that the Plaintiff did owe duties of care to the Defendants.

There is, I find, a misconception as to the claimed breach of contract. The written-in clause (Exh. p 204) "That Bank reserves the right to advertise and sell the security if repossess" does not prevent the Bank putting would be purchasers of secured chattels on notice if, in order to protect its security, the Bank had good grounds to believe secured chattels were being sold or about to be sold.

But the Bank failed, I find, in its duties of care in two respects in relation to the advertisements it placed in newspapers and over radio (but as pleaded in paras. 75 -79 in this part of this claim I am dealing only with the radio). First it took insufficient care to make sure that indeed properly secured items were about to be or were being sold; secondly it then did not make sure that the advertisements were accurate i.e. contained correct information as to actual properly secured goods. Both these matters were capable of being correctly ascertained and/or stated. They were not. Indeed I look at the Bank's lending managers Affidavit of 2 June 1994 in support of the first injunction. In para. 13 it is there stated "The Plaintiff is not aware of any proposed sale of these assets ...".

The form of notice or advertisement over the radio is not as alleged in para.75 of the counter claim, I find. That para. (75) is an exaggeration of what was said. The contents (and days numbers (9) and times of broadcast) are set out at Exh. p 266. Subject to what I have said as to the failure to properly verify the position which would allow such advertisements as appropriate, the general form of advertisement or notice is, in my view, unexceptionable. The difficulty is in the items claimed to be secured - only 1 of the 3 tractors and some freezer containers were in fact secured (Exh. p 204); the other tractors, sawmill plant and equipment including vehicles and motor-bike were not (but had been at various times under earlier loan agreements).

The relevant Bank Officers knew full well what was secured - look e.g. at Exh. pp 242 (12 April 1994) 243 (inspection, of actual items, of 20 March 1994 - but report on "Bank's security" of 28 April 1994) and 250 - 253 (Vava'u manager's report to Head Office

of 19 May 1994 i.e. the day before the first radio advertisement). But, as I find, they panicked wrongly and unnecessarily in my judgment - and in that state drew up and authorised the publication of an erroneous statement. In final arguments the Plaintiff admitted it was careless "in its security verifications and accepts full responsibility ..."

The Plaintiff has formally admitted that those 9 broadcasts (over a 7 day period) went to all listeners in all the island groups of the Kingdom. Although no evidence was called from other listeners the Defendants spoke of their discomfiture in being named in such a way. I will return to damages.

In para.80 of the counter claim the Defendants complain of a rather similar form letter (i.e. similar to advertisements) written by the Plaintiff to a Vava'u shop on 17 May 1994 (Exh. p 248); although again I note that the pleading does not correctly reflect the actual exhibit. The letter was about a meat saw or slicer (as Exh. p 251 recording a prior conversation of Bank manager to shopkeeper, makes clear). This item was not secured. Again not due diligence exercised I find - and again I refer to the lending manager's affidavit of 2 June 1994, para.12: "The plaintiff has also incorrectly informed a potential innocent purchaser of the Defendant's equipment that it has an interest in a meal slicer. This is incorrect and the purchaser and the Defendants have been informed accordingly".

A form of apology was written by the Bank's lawyer on the 2 June 1994 (Exh. p 267), to the Defendants lawyers (who had protested about some of the events of 20 May and following) and to the shop owner.

In para.83 of the counter claim is the last part of this 3 part claim for $30,000 (para.84). This is a claim of defamation or breach of contract. The complaint is of "malicious and untrue rumours" spread by the Plaintiff "amongst the Defendant's workers people of the Vava'u business community and others ...". Allegations of oral communications to 4 named persons are set out in para.83. Only one of those 4 persons was called as a witness. No evidence was offered in support of the other 3 alleged incidents (and even e.g. Exh. p 251 from the Vava'u manager's report of 19 May 1994 does not support the Sifa Lovo claim). As to the fourth i.e. involving Kililasi Ngata, a worker for the Defendants, Mr. Ngata gave evidence (he is a cousin of the Second Defendant). He said that on the 24 May 1994 certain Bank Officers came to take the tractor because the First Defendant "was running off abroad" (that is how the witness said it was put to him by the Vava'u manager of the Plaintiff; and later that "Gavin was going to run away"). These words were spoken in the course of the Plaintiff's servants taking a tractor of the Defendants to which they were not entitled (as it was not secured). There was no breach of contract as claimed but there was a lack of due care and diligence over this tractor, as I will come to, soon.

But I am dealing here with defamation - and that is governed by the Defamation Act (Cap.33). S.16(1) provides that only certain classes or categories of spoken defamatory words are actionable without proof of actual loss through the publication. The words complained of here, if made, and even if defamatory (and I find that they were made and that they were defamatory, within S.21(1) of the Act) were not spoken of the First Defendant "in connection with his trade business or calling" and nor do they fall within any of the other 3 categories in S.16(1). That being the case this part of this claim must fail as there was no evidence before me establishing that the Defendants "suffered monetary or other actual loss in consequence of the speaking of such defamatory words" - S.16(2).

Now comes the difficult part. What are those breaches of duties of care, as detailed (para 115 - 120 above) worth? They resulted in significant and quite widespread activities and actions, causing damage and disuess to the Defendants. But no proof of monetary or other actual loss has been given in evidence. I take account of all the factors I have mentioned, including the full history of the deteriorating relationship of Plaintiff and Defendants and the defamation findings which immediately follow in this judgment. I set a figure of $1,100 general damages as being appropriate (being $1000 as to the radio broadcasts and $100 for the letter of 17 May 1994 (Exh. p 248).

The second and more significant part of this section of claims is the defamation action (paras. 91 - 94 of counter claim) based on the advertisements published 9 times on the radio as already detailed and also in 2 Tongan newspapers of 25 and 26 May 1994. The form of advertisements was the same whatever the medium (see e.g. Exh. pp 255, 262, 263, 264, 266) - and is as pleaded in para. 91(a). Publication was admitted but not the extent of circulation claims (in New Zealand), in para. 92 (and no evidence was given to support that allegation), nor the claims of "embarrassment, suffering and ridicule not only in Tonga but as well in New Zealand", in para. 93 (and no evidence was called to support that either).

It was claimed that the advertisements had caused "the Defendants considerable suffering and worry" and I find that to be so - and that the First Defendant suffered "damage to his business contacts both in Vava'u and in New Zealand where the Defendant export produce" (para. 91) - there was no evidence before me as to that latter aspect however.

The First Defendant's evidence was that on hearing and seeing the advertisements his reaction was of shock and of concern as to the impression given to the whole country of the Defendants not paying their loans and of their possessions being taken by the Bank.

I find that the advertisements were, in all the circumstances as I have gone through them, defamatory - S.2(1) Defamation Act (Cap 33). No privilege is claimed (s.10) nor do I believe it could be so claimed. Truth is a complete defence (s.14) but although some items in the advertisements are true, most are not correct and the background events, I find, did not warrant publication.

The Plaintiff, in final argument put it this way: - "submits in mitigation that the evidence at trial proves no actual malice on the part of the Bank in causing publication of the advertisements, and that its actions were occasioned by a bona fide albeit mistaken belief in the veracity of the entire publication".

As to the newspaper advertisements no proof of any monetary or other actual loss is required (s.16(1)) and in respect of the radio advertisements nor, I find, does actual monetary or other loss require proof because s.16(1)(c) does apply - the words used do relate to or are "in connection with" the Defendants trade, business or calling. "Gavin and Siusi Peacock trading as Peacock Marketing".

So again to the difficult issue: Amount. Well it has to be looked at in the whole at in the whole context and background of the failing Bank/clients relationship and of the Defendants already ailing, if not failing business. No actual losses or figures have been given in evidence. I fix damages here at $7000 (noting a claim - para. 94 of the counter claim, and rather unsatisfactorily mixed in with the assault claim - of $150,000).

Counter claim - Trespass to Goods

These claims are in paras. 81 - 82 (freezers) and 85 - 86 (tractor) of the counter claim

and $10,000 is claimed for each "trespass conversion and detinue" both events having occured on 24 May 1994.

The Plaintiff's employees took 3 freezers and a refrigerator/freezer of the Defendants from a shop in Neiafu on 24 May. The Plaintiff "admits that it was careless in its security verifications ... and accepts full responsibility for its mistaken assumption that it held a security interest in these items ..." (from Plaintiff's closing submissions). Given the evidence I heard the Plaintiff could do little else but admit such wrongful taking of these goods. Again a lack of due care and diligence. On the evidence of the First Defendant the appliances had not been used since August 1993; the Plaintiff continued to hold them until near the end of October 1994 (see Exh. p 276); and the Defendants subsequently sold two of them, after all 4 had been stored and not used by them for some time after recovery.

Again it is quantum of damages which is the difficult question - but I determine that given the circumstances of this interference in property of others without proper checking and verification, and retention of the goods for some time, the damages should be $500. Care and diligence must be exercised if other persons goods are going to be taken.

And now to the tractor on the road from Longomapu. The Bank had not only a registration number but, as well, an engine number for the secured tractor TH-4. (See Exh. p 243, for example). Yet no checks were carried out (of either number) when the particular tractor was taken in, as I find it, quite high-handed circumstances. But it was the wrong tractor. That could have been ascertained. Instead a measure of verbal "bullying" or pressuring of the Defendants' employee took place, I find. The tractor was then driven, and later towed, away; to be reclaimed, only after a considerable degree of assertiveness by the First Defendant a short time later. There was no real voluntariness about the handing back by the Plaintiff; and the physical confrontation I will come to soon.

Again a lack of care and diligence in circumstances where care and diligence were surely required - other persons' goods were being seized. The Plaintiff, in closing, admitted carelessness in taking this tractor and, again, now "accepts full responsibility". The taking and initial detention were aggravated by the attitude displayed to the owner, the Defendants, when they tried to stop its continued detention, and the Bank' servant's performance in not then bothering to go to the Neiafu Police Station as arranged with the Defendants but instead going off to lunch whilst the Defendants did attend the Station to try and sort matters out exemplifies much of that attitude, aggravating as I say it was.

Here then I make an award to the Defendants of $1000 damages.

Counter claim - trespass to person - assault of First Defendant

In the confrontation over the tractor, on 24 May 1994, undoubtedly both the First Defendant and the Vava'u manager of the Bank became quite irate. The manager (for whose actions the Plaintiff accepts responsibility, as being in the course of his employment) I find (and in keeping with the attitude of not properly checking identification of secured goods and of the attitude referred to in paras. 134 & 135 above) did act with a degree of aggression towards the First Defendant both at the Bank's truck window and at the tow rope between truck and tractor as the First Defendant tried to untie it.

One of the manager's fellow employees admitted (somewhat reluctantly) seeing the manager push the First Defendant on his shoulder; other employees were. I find somewhat coy about, and evasive of, the issue when giving evidence. I find that the most reliable account was given by the Second Defendant and I find she did not overstate or evade any aspect of what occurred between the 2 men. She described an initial slapping (not heavy

- a sort of brushing away almost) of the First Defendant's chest by the manager at the truck window; and a holding of the shirt and then a pushing away of the First Defendant, by the manager, at the tow rope.

No injuries were sustained. The First Defendant himself said that the taking of the tractor shocked him more than the pushing. That perhaps put the matter in context somewhat. Yet nonetheless this was trying to regain or recover something he knew was wrongly taken and over which theBank Officers had been careless whether it should have been taken by them or not.

Para.88 of the counter claim does overstate the position markedly (e.g. challenging the First Defendant to fight - no evidence of that; the manager having to be restrained - no evidence of that); but nonetheless I regard the matter as quite serious and as aggravated by the circumstances and background I have described.

The prayer here is for a part of the $150,000 claimed (para.94) for this assault and the defamatory advertisements. I fix the damages here in the sum of $1000 in favour of the First Defendant. As I said at the start it was these events that set off this litigation and it is worthy of note that First Defendant said in cross examination that it was the Defendants' intention to repay until the events of May 1994. That of course also reflects on the earlier issues of payment of the Bank overdraft (see para. 68 above).

Remaining Issues

Given proper adjustments for the 2 sets of (as I find) unauthorised U.L.Fs there should be judgment jointly and severally against each of the Defendants for the proper balance and interest at 13.5% on the Marketing account (para 72 above) and for the proper balance and interest at 13.5% on the personal account (para 87 above). When those figures are calculated and provided formal judgments will be entered.

As well I am prepared to make orders in favour of the Plaintiff (as sought) for possession of the tractor H 14, the truck H 64, all 10 freezer containers, plantation stock and frozen goods (I believe that there may be none of the latter left at all). As to plantation stock, I will come back to that.

I have heard argument as to the words:- Exh. p 204 "loan agreements charging over" which words precede the listed chattels. Those words are meaningless. There were no separate loan agreements. All parties intended that those chattels were to be secured by the loan agreement (at Exh. p 204) itself. The agreement more perfectly should read "Security - charge over tractor etc". But there is no uncertainly. If rectification is required (and I am not sure that it is) I would grant it (as I am permitted - S.80 Evidence Act - Cap 15). As I say orders for possession, based on the security provisions, should and do follow.

I have already expressed my view earlier (paras. 21, 57, 74) as to "stock". Given the general penal provision in the Land Act, s.16, I take the view that in context here, stock means harvested plantation produce - not crops still growing. But as the matter has proceeded, and as now argued by the Plaintiff, this is of little moment. The earlier injunctions covering the 1994 and 1995 vanilla harvests are exhausted. If there is any harvested plantation stock, which I doubt, then it is covered by the orders I have made in para.143.

In fact there is a net loss of some $572.64 from the 2 years vanilla operations - with still some other disputed expenses claimed by the last appointed supervisor, Mr. Warbrooke, (under the injunction of 25 May 1995). I still need to hear from Mr. Warbrooke about those disputed invoices nos. 9 - 19 (Aug - November 1995) although

I am inclined to think that some may be outside the terms of appointment.

Subject to that there should be some small amount in the 2 Bank of Tonga accounts held in this Case's name (under 02-409394-36 and 02-408871--36) for payment out to the Plaintiff and there will be orders accordingly directing payment out to the Plaintiff.

The Plaintiff also seeks an order for possession of Leasehold 4883 situated at Longomapu, Vava'u.

I am not prepared to make such an Order. First the security provision is a pledging of the "registered mortgage" - not the land. The Bank has that mortgage - see Exh. pp 137K - to 137Q - registered on 28 May 1990 - see Exh. p 86.

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Secondly the Bank has power to exercise its authority and take possession of the land claimed under the mortgage and pursuant to s.109 of the Land Act (Cap.132).

Thirdly I have the view that this matter is not, and cannot, come within the civil jurisdiction of the Supreme Court. I refer to s.149 of the Land Act. It is explicit. The Land Act is a code for determining land issues in Tonga. I agree with Dalgety J in Tu'ipulotu v Fau L 134/93 (3 December 1993) as to that - ref. p 4 para.5. I take a different view to Dalgety J as to the "disputes claims and questions" - having to be one of title affecting land. In my reading of the section it relates to jurisdiction to hear and determine:-

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(a) all disputes affecting any land or interest in land

(b) all claims affecting any land or interest in land

(c) all questions of title affecting any land or interest in land.

The matter of possession of land under a mortgage is in my view certainly such a "dispute", "claim" or "question of title"; and the fact that the Land Act specifically deals with mortgages (a whole Part, Part VI) and especially mortgagees taking possession (s.109) indicates clearly where jurisdiction does lie - and Not in this Court.

The Plaintiff has its rights under s.109. I am not going to be drawn into making declarations in this civil jurisdiction.

The Plaintiff will have judgment against the Defendants, jointly and severally, for

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the figures to be calculated - refer to paras. 143, 145 and 147.

The Defendants will have judgment against the Plaintiff for:

(a) pursuant to para. 123 above - $1100

(b) pursuant to para. 130 above - $7000

(c) pursuant to para. 133 above - $500

(d) pursuant to para. 136 above - $1000

(e) pursuant to para. 141 above - $1000 (First Defendant only)

I will now wish to hear counsel on any other matters arising and on costs.