IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **C.NO.1036/97**

BETWEEN : **BANK OF TONGA** : ***Plaintiff***

AND : **GEOFFREY BRIAN BEATON** : ***Defendant***

BEFORE THE HON. JUSTICE FINNIGAN

COUNSEL : Ms Tapueluelu for plaintiff, Mr V Foliaki for defendant.

Date of Hearing : 10, 11, 14, 15, 17 and 18 February 2000
Date of Judgment : 25th February, 2000.

JUDGMENT OF FINNIGAN, J

This essentially is a claim by a trading bank for repayment of two particular loans, which is met by two positive defences and a claim for a setoff and by a separate claim in tort for damages.

It is fundamentally a simple case, but this was not recognised until after the hearing began, because the defendant had filed no more than an informal document called a "notice of intention to defend". He did not file the true statement of his defence and counterclaims until the hearing began. The result was that the Court was overwhelmed with a plethora of unnecessary facts from both parties and anecdotal evidence from the defendant, which did nothing but cloud what were simple issues and drew out the hearing to an inordinate length.

The claim arose in a normal banking relationship. The law that applies to bankers and their customers is clear enough, and must be applied to known facts which are by themselves usually clear from the documents created by the parties. There is very little room for anecdotal claims of what a bank official may have said and what he may have done in the everyday commercial transactions of lending and borrowing. Where there are written loan agreements it is they that must prove the facts. Where there are claimed variations of those loan agreements, the Court will normally look for documentary proof. Where there are signed completed documents, the Court must accept those at face value unless clear proof establishes that they are not what they seem. The defendant in this case claims that he was

a borrower who undertook loan obligations by signing a loan agreement that was partially blank. A borrower who does that has to take the consequences, because the principle applies throughout – if he is prepared to do such a thing, he must accept that the proof of what he agreed will be in the document, not in what he says.

The plaintiff claims repayment of two loans. The defendant's case is (1) that he has repaid one of the two loans. In his pleadings he (2) admits that the other loan is due but he claims that what is due is much less than what is claimed because he denies part of the interest component. In his setoff claim he alleges that whatever he may owe the plaintiff is in any event less than $21,357.55, which he claims is what the plaintiff owes him.

Clearly there has been a war of words between the parties for several years, and this has had the unfortunate result that it has caused them to fail to see an amicable solution to their problem, and the wordy war continued right into the courtroom. It has also meant that some relevant witnesses have long since departed the scene. In general it is not lawful to sue on a claim after 5 years from the time the cause arose, or from the time a payment or an admission was made. The plaintiff's claim is in time. I accept that the counterclaim for set-off is in time because it is an essential part of the long-term relationship that has finally came to court, and it falls to be determined along with the claim. The defendant's submission is that his claim did not arise until it was denied in these proceedings. I accept that. The tort claim I accept as in time because part of the ill health claimed, the cause of action, has on the evidence occurred well within 5 years of the date that the counterclaim was filed.

So I turn first to the plaintiff's claim and the defences to it. What is the position of these parties at law? In what follows I shall make reference to some of the 289 documents which the parties put before me. Documents tendered by the plaintiff are "P", and by the defendant "D".

The first claim is for recovery of an overdraft, long since designated "hard core" and earmarked by the plaintiff for recovery. The defendant's challenge to this is that the plaintiff had waived the interest component on the overdraft. He claims that there was an agreement with the plaintiff in June 1990 that when his overdraft became a non-operating account open only for credits, it became what is called "hard-core", and the plaintiff through the then general manager offered or agreed to cease interest charges on that account. Subsequently, on 21 June 1991, an arrangement was made between the plaintiff and the defendant's accountant for repayment of the overdraft at $400 and of a personal loan at $100 per month. When this was agreed, the defendant was excluded from the meeting. There is nothing about the overdraft interest in the accountant's confirming letter doc P69. The accountant was specific. She confirmed that the arrangement was for repayment of the overdraft at $400 per month and of the personal loan at $100 per month. However, the memorandum of the assistant manager commercial lending after that meeting, doc P68, dated the same day, 21 June 1991, recorded that the new arrangement was for payment of the

interest. And because some interest had indeed ceased in December 1990, he reinstated the interest. However, that interest was not on the overdraft but on the loan account. He reinstated the interest on the loan account. There was nothing about interest in the accountant's letter.

Neither party called the defendant's accountant.

There is support for the defendant's claim, apart from the cessation of interest on his other current loan, in the plaintiff's documents. Document P53 is one of several demands for payment of the overdraft that were sent to the defendant in 1991. On the date of that letter, 21 March 1991, his total repayment due, as demanded, was "$42,853.92, and this sum carries debt excluding interest on your accounts". In doc P55, an annual review of bad and doubtful debt on 31 March 1991, the plaintiff recorded the interest recommendation in these words: "as previously approved on 21.12.90, i.e. cease interest charging on loan and reserve interest on overdraft". Document P165 is a diary memo of 5 October 1993 about the account suffix –12, the overdraft account. Among the recommendations approved is one as follows - "interest/fees to resume on the overdraft account". Document P182 confirms that "re-charging of interest and fees commenced 10/93". Clearly the plaintiff had suspended the interest on the overdraft as the defendant claims. I am satisfied that the defendant had been told this. Interest on his overdraft had ceased, and he said he knew it had. One of the plaintiff's witnesses said that suspension of interest is a matter of internal bank decision, but in the present case it had been advised to the defendant, so it had become a matter for discussion with the defendant. There is no evidence of any discussion with him about reinstatement of overdraft interest in or about October 1993.

He acted in accordance with that thereafter, and had contractual rights that precluded the plaintiff from unilateral variations. One can understand why the interest was reinstated in October 1993. As the officer noted in his memo, the defendant had kept to his repayment arrangements. However, until the plaintiff informed the defendant that it was reinstating interest on the overdraft, and thus gave him an opportunity to make arrangements accordingly, it was prevented by its variation of the contract from reinstating the interest. Reference to the plaintiff's documents shows that in February 1991 it had told the defendant (in docs P48 & P49, to which I shall shortly refer) that it would accept in settlement of the overdraft $33,359.68, being the amount due as at end of August 1990 without further interest. By reverting to adding interest, it was unilaterally altering that.

I now have to fix the amount that had been due when the defendant was told the interest on the overdraft had ceased.

There was no evidence about whether bank charges were to cease with the interest, except that the documents P48 & P49 seem to presume that they did, and I accept that. The amount became fixed as at August 1990. The evidence of the amount then due is in the plaintiff's documents P48 and P49, both being letters in which the plaintiff demanded re payment of the

overdraft. The amount demanded against the overdraft was $33,359.68, and in P49 that sum was specified as being fixed at the end of August 1990. This is reasonably consistent with the defendant's statement that the offer or agreement to cease interest was in June 1990. I have no difficulty fixing the amount of the overdraft debt at $33,359.68, without interest. That is the amount that was needed to repay the overdraft in full.

This amount is by now partly repaid. As I understand the evidence (doc P69 and oral examination of the defendant), reductions started on 28 June 1991 and continued monthly at $400 until 31 January 1996 when the defendant ceased paying. On the assumption that this is a period of 56 months and that every payment was made, the total reduction has been $22,400, leaving a balance of $10,959.68. I hold that this is due for payment by the defendant.

That was the first of the two loans claimed. The second is a term loan. The evidence for it is primarily doc P198, a loan agreement. There are other associated documents, particularly the finance application, doc P194A, and the diary memo, doc P195. There are also docs P196 and P197. I accept the loan agreement as saying what is on its face. I reject the defendant's claim that it was filled in after he signed it

The defendant's claim is that he has repaid this loan. I have no hesitation in upholding that claim on the facts. The loan agreement does not reflect the terms of this loan as set out in the preliminary documents. What was agreed was a further advance of about $3,989.07, depending on exchange rates, for materials to complete a particular order for manufactured sandals. There had previously been a major advance, secured against the cash receipts from the order. The further advance was well within the amount secured to the plaintiff and there was at first to be no further security. Neither were there to be any interim repayments, because the whole loan was secured against and repaid from the payment to be made upon completion of the order. This in fact happened, the purchaser's payment was made to the plaintiff, and it extinguished the whole loan.

However, when the loan agreement was prepared, the plaintiff added further securities (which were already pledged as security for other advances) and the $400 per month repayment that was already being made. To the plaintiff this may have seemed tidy, but adding them to the loan agreement did not add anything to what had been agreed. The terms of the loan are specified in doc P194A and doc P195. Those terms were met and the loan repaid when the purchaser's payment was credited to the loan account. This claim must fail.

It may be that the plaintiff, having failed to recover the money claimed under this head, will [illegible] advance under some other head. I do not know. It is clear on the evidence that the claim based on the loan agreement doc P198 must fail. I hold accordingly.

I come now to the defendant's claim to a setoff. Briefly, the parties had been in a commercial relationship, as banker and borrower, since 1982. The defendant was manager of a manufacturing company, Michael O'Brien Tonga Limited (" MOB"), which was also a borrowing customer of the plaintiff.

Over the years since then, the defendant continued a close relationship with the plaintiff which included borrowing needed capital from time to time. The plaintiff obliged, ensuring always that it had security. By the time this action commenced, November 1997, the balance said to be overdue, including accumulating interest and charges, was said to be $19,352.48 plus $7905.47, a total of $27,257.95 plus interest on each at differing rates from 1 July 1997 as set out in the statement of claim.

On 9 August 1983 plaintiff exercised a power to appoint a receiver of MOB. The receiver and the plaintiff's officers changed locks and gave instructions to the defendant to run the business, with a view to sale. The defendant carried on as instructed, and the directors of MOB later accepted, despite some suggestion that he may have stopped working for the company in January 1984, that he had done so through the period of the receivership.

The receiver was retired by the plaintiff in June 1984. The directors of MOB thought that the retirement date was 28 June (doc D36), the receiver said it was 20 June (doc D10) but the Board meeting of plaintiff at which the receiver's retirement was decided was on/about 29 June (doc P252). I find that the date was 28 June.

After the receiver retired, the defendant continued to operate the business and continued to draw loan finance on his own account from the plaintiff. The defendant for his part had earlier been pursuing his own claims against MOB for wages and other emoluments, and for reimbursements of claimed expenses. He continued these claims against MOB and at a Board of Directors meeting on 13 August 1984 MOB accepted part of his claim. He transferred the other part of his claim to the plaintiff, i.e. for the period of the receivership, and that is the cause of action in his counterclaim for a set-off.

The liability of the plaintiff for actions taken by the receiver is clear. See Halsbury 4th ed Vol 39 #805. On some basis which has not been shown or challenged, the plaintiff appointed a receiver out of court, and under the normal law governing such receiverships the plaintiff is liable for the acts of the receiver, who was no more than its agent. The plaintiff is liable to the defendant for his reasonable wages, other emoluments and expenses incurred by him under the instructions of the receiver. The major calculations of these are those claimed by the defendant in his letter of claim on the receiver, doc D8, and in doc D36, the calculation discussed and accepted by the Board of Directors of MOB on 13 August 1984, after the directors had resumed management. In my opinion the amounts accepted by the Board of Directors are authoritative, being reached in the course of

the company's business and recorded in the minutes of their meeting. They are in my opinion more favourable to the defendant than any calculation from the figures he sent to the receiver, because some of those original claims are outside the ambit of what he might recover within this head of his claim.

I accept the view of the Board of Directors that what was due to the defendant for his work done on instructions of the receiver is the sum of $12,700.14. This sum represents a debt incurred on behalf of the receiver, and is a liability of the plaintiff. I hold accordingly.

The defendant claims interest on this amount at 10% p.a. In my view the award must carry some interest, because there is no justification for the plaintiff's refusal to meet its obligation in 1984. From the evidence of one of its witnesses I know that it maintained its control of the company for about 11 months after being told by the receiver that there was little he could do. During this period when the plaintiff maintained the company in statutory receivership, the defendant ran the business for it, and his claim on the plaintiff for reimbursement was justly made. The plaintiff caused the situation, become the employer of the defendant and thereafter made no moves to accept the consequences of its action. It was mentioned in evidence more than once that this had been the first receivership in Tonga. If that were so, it does not affect the situation at all. The plaintiff was bound by a simple and clear legal principle from the time that it appointed its receiver and took over management of the business of MOB Ltd, and cannot absolve itself from the legal consequences of its considered actions. I have held that the defendant should be paid and it is just that he should have in addition some compensation for being kept out of his money for 16 years. He claims interest at 10%, originally 13%, on the basis that had he had the money he could have invested it for a return in that order.

To decide this claim I have to consider the evidence of the facts. There was none about investment returns over that period. The defendant was at that time and till about 1991 trying to succeed where MOB had failed, and that was where his investment should and most likely would have been. He consistently operated the business, until it ceased, with insufficient capital and with expensive short-term finance from the plaintiff. On the evidence I have to conclude that most likely he would have used this money in the business. Had he done so he would have reduced his borrowings by $12,700.14 and thus saved interest on that amount at the various rates being charged by the plaintiff – 9%, 10%, 11.75% and 13

Now, I have to apply the quasi-contractual principle of quantum meruit, because I must assume from the evidence what I think the parties would have provided in their arrangements had they turned their minds to this. I start by adopting the interest rate that the plaintiff was applying to the defendant's loan at the time this debt accrued, 1984. This was 9%. I then apply the commercial practice that the plaintiff has been applying, and accumulate the interest. I add no fees or charges since the defendant had none. Over the period from 1985 to 1997 both inclusive, at 9%, the original

debt of $12,700 had become by my calculation $35,720.85. In quantum meruit I would not give judgment for that amount, because the parties clearly would not have continued accumulation of the interest for the whole of the 16-year period till now. It seems clear to me that the time to cease adding the interest to this debt of the plaintiff was the time when the plaintiff ceased to add interest to the overdraft debt of the defendant. This was at the end of August 1990. The period is almost exactly 6 years, and the amount accumulated at 9% per annum by my calculation is $21,299.17. That is the amount that I award on the counterclaim for setoff.

Finally I come to the defendant's claim in tort for damages of $1 million. I must say that this is for an exaggerated amount, which costs the claim some credibility. The amount is out of proportion in the circumstances of this case and of local conditions. Further, it rests only on the evidence of one doctor in Tonga, qualifications not stated, who gave evidence and who sent him to Australia for confirmation of the diagnoses made by herself and others, and thereafter on nothing more than untested letters written to one another by doctors practising in Australia.

I find very little in the evidence that supports the claim. The evidence itself does not add up to a case of cause and effect. Even if cause and effect were established, there is still the fact that the medical evidence is entirely insufficient for the purpose of a damages claim. I cannot find anything in the evidence that establishes this claim to a level of probability, and I dismiss it.

CONCLUSION

What is the result? I have found for the plaintiff on its claim, in the sum of $10,959.68. I have found for the defendant on his counterclaim for setoff in the sum of $21,299.17. In the balance, judgment is entered for the defendant in the sum of $10,339.49, with costs to the defendant. I exercise my power under SCR O29 R2 and fix the costs. I bear in mind the quantum of that award, together with preparation time for both parties, the time taken for the trial and the time added to the trial by the defendant's own delay in specifying in proper pleadings the details of his defence. I fix costs at $2,000.

NUKU'ALOFA; 25 February, 2000

JUDGE