PACIFIC COMMERCIAL BANK LIMITED v
URIA (FOGAVAI AND LUISA)

Supreme Court Apia
Sapolu, ACJ
2 May 1990

PRACTICE AND PROCEDURE - application for rehearing of a civil claim - possible defence disclosed - Rule 140.

HELD: Rehearing granted on conditions to be met by the Defendants.

CASES CITED:

- Watson v Briscoe [1966] NZLR 35

R Drake for Plaintiff
T K Enari for Defendants

In considering this motion [for rehearing] the Court must ensure there is no miscarriage of justice and one of the matters that the Court takes into consideration in deciding a motion like the one before the Court is the question whether there is a possible defence open to the Defendants. The authority which sets out the law that is applicable is the case of Watson v Briscoe [1966] NZLR 35.

The question is, where does the justice of the case lie and in this case the applicants are saying there was a loan from the Plaintiff and that about 1970 arrangements were made with a particular officer of the Plaintiff Bank for the transfer of the loan to one Uela Nifo. The Bank denies that allegation. It is difficult for the Court to decide who is telling the truth without the benefit of seeing the witnesses and hearing their evidence and observing their demeanour. Such a decision can only be made at a hearing when witnesses are called. But as of now the Court is not in a position to say whether the Bank is right or the applicants are right. The Court is not in a position to know where the truth lies. In other words the Court is not in a position to decide whether or not the defence which is opened on the documents filed by the Defendant applicants is a real defence or not. Thus if the application is refused and there is a real defence the injustice to the applicants would be that the Court will force them or require them to pay a loan which they claim has already been transferred to another person. The injustice to

the Bank as I see it if the motion is granted is that one of the Defendants was made aware by counsel for the Bank that this matter was coming before this Court some years back but he failed to appear notwithstanding notice that was given to him. To put it another way, the defendant Fogavai Uria failed to approach counsel for the Bank when he was asked to do so and this matter has proceeded from one stage to another until the position the parties are now in.

The injustice to the Bank as I see it today is that if the motion is granted it has already incurred legal costs in recovering the amount of the loan from the Defendants but I consider that that [in]justice is the kind of injustice that can be cured or can be compensated for by costs. The injustice to the Defendant applicants if the application for a new hearing is refused is that they will have to pay substantial amounts to the Plaintiff Bank when they may have a valid defence. That injustice in my view is incurable whereas the injustice to the Plaintiff Bank if the motion is granted is curable or able to be compensated with costs. In these circumstances, the court considers that the just resolution of this matter is to grant the application but subject to these conditions. The Defendants are required to file a statement of defence to the action and serve it on the Plaintiff within 10 days from today. Secondly the Defendants are required to pay costs of $300. Those costs to be paid within 10 days from today and on failing to do so, the Defendants will not be allowed to defend the action and the judgment summons order which this Court has already issued will be restored and enforced. Finally on the question of which rule this motion should have been brought under, I consider that the appropriate rule is Rule 140 and I treat this application as an application filed under Rule 140. Even though the application is brought as a motion for rehearing there is nothing in the application to show it is so other than the words "Motion for Rehearing" on the backing sheet of the documents filed so I treat the motion as an application under Rule 140.