IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 12 of 2015

NUKU'ALOFA REGISTRY [CV 98 of 2010]

BETWEEN: AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD

- Appellant

AND : HON. LASIKE TRADING AS SANDYBOYS MOTEL

- Respondent

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel : Mr. A. H. Waalkens KC and Mrs. P. Tupou for the Appellant
Mr. W. C. Edwards SC for the Respondent

Date of Hearing : 29 March 2016

Date of Judgment : 8 April 2016

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of Cato J entered pursuant to the verdict of a jury. The action was brought by the Bank to enforce a debt resulting from 8 loan agreements it claimed the defendant entered into between 5 October 2004 and 30 October 2006. It also sought to enforce a further agreement between the parties relating to the use of an EFTPOS machine in the defendant's motel. This enabled the defendant and his staff to debit the credit and debit cards of customers and transfer the proceeds to the defendant's overdraft account with the Bank.

[2] The difficulties faced by the trial Judge and the Jury arose because six of the eight loan agreements and inferentially the agreement relating to the use of the EFTPOS machine were said to have been destroyed when the Bank's premises in Nuku'alofa were burned down in the riot on 16 November 2006. The difficulties were compounded by the decision of the Bank to sue on the eight loan agreements instead of on a common money count for money lent.

[3] The loan agreements dated 5 October 2004 (no.1) and 22 October 2004 (no. 2) had been in the Bank's strongroom,

survived the fire and were produced. The defendant admitted signing those agreements. The Bank was able to produce copies of the other 6 agreements from the records on its backup computer but these copies had not been signed by the defendant.

[4] The Bank relied on its general system, proved by Mrs Leilani Va'enuku (Pw1) and Mr Sosaia Sefesi (Pw2), that money would not be lent to a customer on a loan account or overdraft unless and until the Bank had received a copy of the relevant agreement signed by the customer. There was also evidence from Pw2, who managed the account from late 2005 until early 2008, that he had sighted in the Bank's file signed copies of agreements nos 1 to 3, and 5 and had seen the Defendant actually sign agreements no 6 and 7 which he had prepared.

[5] At the end of the trial the Judge left 4 questions to the Jury. Question 1 asked whether they found that the Defendant entered into agreement no 7 (10 March 2006) or agreement no 8 (30 October 2006) either by signing those agreements or that entry into those agreements might be inferred. The Jury answered those questions in favour of the Defendant. If those questions had been answered favourably to the Bank it would not have been

necessary for the jury to consider the questions relating to the other loan agreements because agreements nos 7 and 8 incorporated the loans made pursuant to the earlier agreements.

[6] Thus the Jury had to answer questions 2 (c), (d), (e), (f), (g) and (h) relating to loan agreements nos (1) to (6). The Defendant admitted agreements nos (1) and (2) which the Bank produced in signed form because those had been in its strongroom and had survived the fire. The Jury found for the Bank on those two agreements but found for the Defendant on the rest.

[7] Question 3, which asked whether the Bank was authorised to debit certain charge back amounts to the Defendant's overdrawn cheque account, was answered in favour of the Defendant. The Jury answered question 4 by finding that the Defendant owed nothing to the Bank.

[8] The trial Judge acted, as he was bound to, on the verdicts of the Jury and gave judgment for the Defendant dismissing the action. The Bank appealed from the verdict (AB 272) seeking orders setting aside the answers to the questions other than those to question 2 (c) and (d) asking for a new trial.

[9] The Bank claimed that the adverse verdicts were against the evidence and the weight of the evidence and were perverse. Later the written and oral submissions for the Bank invited this Court to enter judgment for the Bank rather than order a new trial.

COMPETENCY OF APPEAL

[10] Mr Edwards SC for the Respondent, in his written submissions received by the Court on the morning the appeal was listed for hearing, took the preliminary point that there was no right to appeal from the verdict of a civil jury. He relied on s.10(1)(a) of the Court of Appeal Act which relevantly provides:

> *"(1) An appeal shall lie in any cause or matter ... to the Court of Appeal from a Judge of the Supreme Court sitting in first instance in the following cases –*
>
> *(a) From all final orders, judgments and decisions ..."*

[11] Mr Edwards relied on the difference between s.10(1)(a) and ss.16(a) and 17(1) of that Act which in terms allow this Court to set aside the verdict of a jury in a criminal case which (s. 17(1)) is "unreasonable or cannot be supported having regard to the evidence". This section also distinguishes between a conviction and the verdict on which it was based.

[12] Section 91(1) of the Constitution relevantly provides:

> *"Subject to the provisions of any Act ... a party to any proceedings in the Supreme Court who is aggrieved by a decision given in those proceedings by that Court, or a Judge thereof, sitting in first instance may appeal to the Court of Appeal against such decision."*

[13] Although s.91(1) is subject to the Court of Appeal Act, s.10(1)(a) should be given a construction which avoids or minimises any inconsistency with the rest of s.91(1).

[14] The Jury "gave" a decision when it delivered its special verdict. Although the right of appeal in s.10(1)(a) is from a Judge of the Supreme Court it is from "final orders, judgments and decisions". The judgment of Cato J was based on the verdict or decision of the Jury. If that verdict is set aside by this Court that judgment must also be set aside.

[15] Section 91(1) of the Constitution mentions "a decision given ... by [the] Court" and one given by "a Judge thereof". When a case is tried by a Judge and Jury the tribunal is divided and the Court comprises the Judge (who decides the law) and the Jury (which

decides the facts). The Jury's verdict is therefore either a decision of the Court or part of its decision.

[16] At common law the Court in Banc had inherent jurisdiction to review the verdict of a jury, and to set it aside if it was against the evidence and the weight of the evidence. This inherent jurisdiction was an element in the rule of law now embodied in s.83A of the Constitution. Section 91(1) of the Constitution and s.10(1)(a) of the Court of Appeal should be interpreted so as to allow this Court to supervise the verdicts of juries in civil cases and to set aside those found to be perverse. As we have shown above, the text of these sections supports this conclusion.

[17] In our judgment the Bank's appeal to this Court was competent and this Court can set aside the verdict of a civil jury in whole or in part that is found to be perverse.

The loan agreements relied on by the Bank

[18] The Jury answered questions 1 (e) and (d) in respect of agreements nos (1) and (2) dated 5 October 2004 and 22 October 2004 in favour of the Bank. This was not surprising since the Bank was able to produce the signed originals and the Defendant

admitted signing them. The amount lent to the Defendant under these agreements totalled $235,000. Subject to any later payments which reduced the principal debt, this amount would still have been owing when the action was commenced.

[19] The Jury answered question 1(e) in respect of agreement no (3) dated 24 December 2004 adversely to the Bank. The statement of Defence put the Bank to proof of this agreement either by proof of its execution by the Defendant or by inference from circumstantial evidence (AB 38). However, the Statement of Defence admitted receipt of the loan (AB 39 par 11). The statement of claim had alleged that the proceeds of this loan have been credited to the Defendant's loan account 1448269 on 29 December 2004. The amount agreed to be lent was $53,000 (Ex 1 32) making a total of $290,000. The Defendant drew down $54,000 on 29 December 2004 bringing the debt on that date to $290,989.35 (Ex 1 4).

[20] Pw1 gave evidence about agreement no. 3 based on the Bank's documents retrieved from its remote computer and the Bank's system in withholding loan funds until receipt from the customer of the signed agreement for loan. She did not see the Defendant sign the agreement, or sight the original signed documents. As

will be seen, Pw2 said in evidence that he had sighted the Bank's copy of this agreement that had been signed by the Defendant.

[21] Pw1 gave evidence, based on the Bank's records (Ex 1 38-9), that the proceeds of agreement no. 4 (22 June 2005) in the form of an agreed overdraft on the Defendant's cheque account were made available to him and were availed of (AB 81-2, 84). Pw2 said in evidence that he had not sighted this agreement signed by the Defendant.

[22] Agreement no 5 (4 August 2005) provided for a further loan to the Defendant of $100,000 making a total debt on his loan account of $405,940. There was also a debt on his overdrawn cheque account of $25,000 (AB 86). The additional loan funds were credited to the loan account and drawn down and deposited to the cheque account. The movement of the funds is shown in the loan account (Ex 1 4) and the cheque account (Ex 1 39). Oral evidence based on these bank records was given by Pw1 who was not involved in the transactions at the time. Pw2 had not been involved in this transaction, but said that he had sighted the original agreement signed by the Defendant after he took over the management of this account for the Bank later in 2005.

[23] Agreement no. 6 (2 November 2005) added $50,000 to the Defendant's loan account making a total of $405,397 plus the overdraft facility of $25,000. Pw1 gave evidence based on the Bank's records that the funds were drawn down into the Defendant's cheque account on 7 November 2005 (Ex 1 5, 45). She also said that the Defendant made the payments due to the Bank in accordance with agreement no 6 in December, January, February and March (AB 88-9).

[24] Pw2, who by this time had charge of the Defendant's accounts at the Bank, prepared this agreement after obtaining approval for the new loan from higher management. He went to the Defendant's motel at his request to get the agreement signed, and saw the Defendant sign it. (AB 151, 154).

[25] Agreement no 7 (10 March 2006) increased the loan account by a further $50,000 making a total of $482,512 and increased the overdraft facility by $25,000 to $75,000. The loan increase was drawn down progressively between 22 March and 13 April and the proceeds credited to the cheque account (Ex 1 4-5, 52-4).

[26] The Defendant's overdraft already stood at $78,203.18 on 10 March 2006 so the increase in the limit to $75,000 was intended to regularise the existing position (Ex 1 52). The Defendant was supposed to pay $25,000 off the overdraft by 31 March 2006 and a further $25,000 by 31 July 2006 in accordance with agreement no 6 (AB 89,91).

[27] Those lump sum payments were not made, partly because the Bank charged back amounts credited to the cheque account for what it claimed were payments to that account which the holders of credit and debit cards had not authorised the Defendant to charge. These charge backs, which reversed earlier credits to the Defendant's cheque account, began in June 2006 and continued. Some of the charge backs were substantial, $28,653.85 on 19 July 2006. $35,801.65 on 31 July 2006, and $29,477.66 on 11 August 2006, when the overdraft stood at $166,435.64. (Ex 1 60-1). The total amount charged back was $153,475.50.

[28] Pw2, who no longer worked for the Bank, said in evidence that he had prepared agreements nos 6 and 7 at the request of the Defendant, had them approved by his manager, and saw them signed by the Defendant at his motel.

[29] He saw signed copies of agreements nos 1-3 and 5 when he reviewed the Bank's file in the course of preparing submissions to higher management on the Defendant's application for further loans from the Bank which led to agreements nos 6 and 7 (AB 150-2, 195).

Defendant's admissions of indebtedness to the Bank

[30] As at 8 September 2006, when the Bank's management took steps to regularise the Defendant's overdraft of $203,000 which was way over the authorised limit of $75,000, the Defendant was up to date with his payments to the loan account (Ex 1 6, 93) but they had not reduced the principal debt on that account following agreement no 6 of 10 March 2006 when the loan account stood at $432,511.57 (Ex 1 5,72).

[31] In other words the $235,000 owing under the loans made pursuant to agreements nos 1 and 2 (ex 1 30) and the additional $53,000 lent under agreement no 3 [19] had not been reduced by the Defendant's payments in the meantime.

[32] The Defendant failed to make the payments due under his loan account in August, September and October 2006, and was already in default when the riot occurred on 16 November 2006. This led to the destruction of the Bank building and affected business at the Defendant's motel although it was not damaged (Ex 1 103).

[33] Following the fire the Bank combined the Defendant's loan and overdraft accounts, as it was entitled to, and the combined debt in December 2006 stood at $719,620.44 (Ex 1 6).

[34] The Defendant made no further payments to the Bank until 22 February 2008 when he made a payment of $100,000 (Ex 1 6) which reduced the debt to $740,450.92. In other words the debt of $719,620.44 shown as due in December 2006 (above) had increased because of the interest and fees which had accrued in the meantime.

[35] The Defendant made no further payments after 22 February 2008 and interest and fees continued to accrue on the combined account.

[36] On 8 December 2006 the Defendant spoke on the telephone to Pw2 with a request for loan payments to be suspended because his business had been disrupted as a result of the fire. Pw2 recorded the request in a diary note (Ex 1 103) and asked the Defendant to put his request in writing which he did (Ex 1 104).

[37] On 17 April 2007 the Defendant wrote to the Bank saying that his new manager wanted "to settle our loan issues as soon as possible" (Ex 1 107).

[38] On 12 June 2007 the Defendant proposed "an Income Sensitive Repayment Schedule" commencing in July 2007 at $2500 a month increasing to $8200 a month after June 2008 (Ex 1 108). He wrote "we are doing everything humanly possible to ... settle our account as smooth as possible" (Ex 1 109). This letter recorded the Defendant's thanks to the Bank for its consideration. He made no complaint. None of these payments were made.

[39] The Bank's attempts to formalise the current position by having the Defendant sign letters of offer in June 2007 and October 2008 (Ex 1 110, 118) were unsuccessful because he refused to sign the letters.

[40] On 6 November 2007 Pw2 recorded in a diary note (Ex 1 126) his conversation with the Defendant who proposed a restructuring of the accounts with interest only repayments and lump sum repayments of $100,000 by 31 January and $500,000 by 31 August 2008.

[41] The conversation on 6 November 2007 recorded in that diary note, on which Pw2 was not cross examined, was an admission by the Defendant that he then owed the Bank at least $600,000 because he was proposing interest only payments in the meantime. This confirmed, in more specific terms, his general admissions of indebtedness referred to in paras [36] – [38] above.

[42] On 16 January 2009 Mr Yeoman, then head of Relationship Banking, recorded in a diary note (Ex 1 130) a meeting with Sandra Schaaf the Manager of the Defendant's motel, during which she stated that the Defendant "believes that the LOO [letter of offer of October 2008] "is varied in comparison to the one he previously signed". In context this could not have referred to the agreement he admitted having signed on 22 October 2004 (no.2).

It was an admission that he had signed agreement no 7 of 10 March 2006.

[43] On 20 January Sandra Schaaf wrote to Mr Molisoni of the Bank's lending department stating "we have recently noticed that there were various accounts registered and owned by Sandyboyz and later merged into account no 1489487" (the Defendant's loan account) (Ex 2 147). This appears to be a reference to the bank statements at ex 2 154 – 7 considered below.

[44] On 26 January Mr Yeoman made a note recording a telephone call from the Defendant in which he complained of the credit card charge backs "that formed part of the total lending" (Ex 1 132). The Defendant made no other complaint at that time.

[45] On 28 January the Defendant wrote to Mr Yeoman referring to the latter's letter of 21 January (ex 1 148) stating that "we have respectfully requested our information since 2007" attaching signed copies of his Manager's letters dated 19 April and 3 May 2007 (Ex 2 130, 132). This is the first complaint on the Bank's failure to answer those letters made nearly two years after they were sent.

[46] Mr Yeoman replied to that letter the following day (Ex 2 150). He said that Sandra Schaaf's letters enclosed [45] above were not held on the Bank's file and he had not seen them before.

[47] On 29 January Sandra Schaaf replied in a letter to Mr Dansey of the Bank copied to Mr Yeoman (Ex 2 151.3) in which she "disagreed with your final balance", and complained that she had not received the information in "my letters" of April and May 2007 ([45] above). She referred to the Bank statements [43] above which she claimed showed inconsistent balances.

[48] Sandra Schaaf wrote again to Mr Yeoman on 17 March 2009 (Ex 2 158) attaching a schedule of disputed transactions with a recalculation of the amount due of $453,377.06, after deducting the disputed amounts (Ex 2 160).

[49] At a meeting with Mr Yeoman on 25 March evidenced by his diary note of that date (Ex 1 134) Sandra Schaaf offered to pay the Bank in June 2009 $646,000 representing 85% of the funds due to the Defendant on settlement of some land sales.

[50] Sandra Schaaf sent a lengthy memorandum to Mr Hubbard the General Manager of the Bank on 13 August 2009 (Ex 2 162). This produced a lengthy reply dated 21 September (Ex 2 163) in which Mr Hubbard said that most of the actual cheques and deposits, except many of those in 2006, were stored off site and could be produced for inspection.

[51] He continued by saying that all loans drawn down were debited to Sandyboyz's loan account and credited to the operating account. All payments from the operating account were initialed by Sandyboyz. He offered an explanation of the apparent discrepancy between the letter of offer of 4 August 2005 produced by the Bank and the copy produced by the Defendant.

[52] On 4 September Sandra Schaaf met Mr Hubbard and he recorded the meeting in two diary notes (Ex 1 136, 137). She said that "she had some signed letters which were different from ours ... she agreed to provide those letters to us".

[53] Sandra Schaaf's letter of 9 September (Ex 2 176) cannot be understood without the Index and enclosures which were not included in Ex 2.

[54] Fortunately it appears from Mr Hubbard's memorandum of 11 September (Ex 1 139), that Sandra Schaaf had sent a copy of the Bank's letter of offer of 4 August 2005 referring to an overdraft facility of $25,000 whereas the Bank's copy from its computer referred to a facility of $100,000 (Ex 1 65). He noted that the Bank had granted the $100,000 facility, that the computer noted that the last amendment to the letter had been made on 4 August 2005, that the $100,000 was drawn down and credited to the loan account, and that the next agreement in November 2005 (Ex 1 68) referred to the existing debt as it had been increased by that $100,000.

[55] On 11 September Mr Hubbard met Sandra Schaaf at the motel and recorded the meeting in two diary notes (Ex 1 138). He made the points outlined in his memorandum of the same day [54].

[56] Sandra Schaaf replied on 16 September (Ex 2 167) saying "we have already proved several variations between our signed records and your unsigned virtual copies", that "we can prove that those cheque book were never order and used by us",

questioning "who authorised the loan and who withdrew the money".

[57] On 21 September Mr Hubbard replied (Ex 1 140-3) stating that Sandyboyz had received and disbursed the full benefit of the loan proceeds. He explained that Bank statements were held in electronic form and survived and that most of the cheques and deposits could be produced for inspection.

[58] The Defendant and Sandra Schaaf did not attempt to inspect the cheques and deposits held by the Bank either then or before the trial.

[59] In response to a letter of demand from the Bank's lawyers Mr Clive Edwards wrote on 30/11/09 (Ex 2 170) stating, among other things, that "the soft copies from the computer do not correspond with the signed copies in client's possession".

Alleged discrepancies in Bank statements

[60] One of the Defendant's complaints in his manager's letter of 29 January 2009 [43], [47] above related to alleged discrepancies in the Bank statements (Ex 2 154-7). Three of those statements

relate to the Defendant's current account 1448225. They were printed on 8 March 2006 but the information relates to earlier dates. The closing statement (Ex 2 154) records transactions between 7 and 9 February 2005 when the account was closed and the debit balance was transferred to the Defendant's loan account as shown on Ex 1 4.

[61] The number recorded on the closed account for the destination of the debit balance does not correspond with the number of the account where the debit ended up. However the closing balance of $7430.54 for the cheque account recorded on Ex 1 4 corresponds, subject to the deduction of the interest charge of $17.77 with the debit balance on Ex 2 154 ($7448.71 less $17.77 equals $7430.54).

[62] The different balances for the cheque account shown on ex 2 156, 157 relate to different dates before the account was closed. The Defendant did not complain about the alleged discrepancies for 3 years after obtaining copies of these statements and Pw1 and Pw2 were not asked in cross examination to explain them. The closing balance of $323,486.54 shown on Ex 2 155 for the

loan account on 29 April 2005, corresponds with the balance on the same date shown on Ex 1 5.

Challenges to the Jury's verdict

[63] A Jury acting reasonably could not have used the bank statements in Ex 2 154-7 as a basis for rejecting the bank statements in Ex 1 relied on by the Bank in its case.

[64] A Jury acting reasonably and giving proper consideration to the undisputed documentary evidence in exs 1 and 2 could not have failed to notice the Defendant's admissions that he held signed copies of loan agreements other than nos 1 and 2 which were admitted and that he had not produced those other agreements. The Defendant's admissions are referred to in paras [42], [52], [54], [56] and [59].

[65] A jury acting reasonably could not have failed to find for the Bank on agreement no 3 of 24 December 2004 when the loan of $53,000 was admitted in the amended statement of defence (AB 39) bringing the admitted debt to $290,000 (Ex 1 32). Similarly a jury acting reasonably could not have found that the Defendant's payments had reduced this debt [30], [31].

[66] A jury acting reasonably could not have failed to find on the unchallenged evidence of the Bank that it was owed a substantial sum of money. Apart from the general admissions of indebtedness referred to in [37], [38], [44] and [47] and the first three loans [65] there were admissions that the Defendant owed specific sums. In [40] and [41] it was $600,000, in [48] it was $453,377.06, and in [49] it was $646,000.

[67] The jury were entitled to reject the Bank's case on the charge backs because the contract relating to the EFTPOS machine was not proved, nor was the Bank's right to charge back, or reverse particular credits to the Defendant's cheque account. Mr Waalkens KC frankly conceded that the jury's answer to question 3 in favour of the Defendant could not be disturbed.

[68] The Defendant did not call any oral evidence, and did not produce the signed copies of the loan agreements in his possession. He did not attempt by oral evidence to support any of his numerous claims in the later years that the loans, the cheques, and the deposits were unauthorised, and that the funds had not been

used in the motel business. The Defendant's case at the trial was based on the supposed weakness of the Bank's case.

[69] A Jury, in considering the supposed weakness of the Bank's case, and acting reasonably, was bound to bear in mind that if the case really was weak the Defendant could have gone into the witness box to give evidence that he had not signed the agreements in dispute, to explain the admissions, and to prove that the cheques and deposits were forgeries and that the funds had been misappropriated by others.

[70] A Jury, acting reasonably, were also bound to consider that the evidence of Pw1 explaining the transactions shown in the documents and her evidence about the Bank's system had not been challenged in cross examination. Acting reasonably a jury was also bound to consider that the evidence of Pw2 that he had sighted signed copies of agreements nos 1-4 in the Bank's file, and had seen the Defendant sign agreements nos 6-7 had not been challenged by the Defendant in cross examination.

[71] The failure to cross examine a witness on a particular topic has legal consequences. In *Browne v Dunn*, a decision of the House

Lords reported only in (1894) 6 The Reports 67, 70 Lord Herschell LC said that it was:

> "absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth ... to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made ... If you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him".

[72] In the same case Lord Halsbury said at 76-7:

> "To my mind nothing would be more absolutely unjust than not to cross examine a witness ... and ... to ask the Jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to ... [He considered the facts of that case and continued at 78] Under those circumstances what question of fact remains? What is there now for the Jury after that? If [counsel] admits before the Jury ... by the absence of cross examination ... that these statements are true, what is there for the Jury. It is impossible ... to dispute ... that that absolutely concluded the question".

[73] In other words in a proper case, such as the present, the failure to challenge the evidence of a witness by appropriate cross examination involves the acceptance of his evidence if it is otherwise credible. *Browne v Dunn* has been followed in Australia and New Zealand.

The legal principles

[74] The principles on which an appellate court acts in setting aside the verdict of a jury are not in doubt. The statement of principle in the *Metropolitan Railway Co v Wright* (1886) 11 App Cas 152, which was adopted by this Court in *Tu'i'onetoa v Pohiva* (2001) Tonga L. R. 58, 63 is sufficient. The verdict of a jury can only be set aside if it was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

[75] In our judgment, for the reasons we have already given, the special verdict of this jury, other than their answers to question 2(c), (d) and 3 cannot stand, and to that extent it must be set aside. The words of Lord Atkin in *Mechanical and General Inventions Co v Austin* [1935] AC 346, 369 are applicable:

> "... the finding of the jury is inconsistent with and impossible to reconcile with ascertained facts".

[76] There were hundreds of pages of documents in Ex 1 and Ex 2 and it may also be said, in favour of the jury, that the language of Lord Atkin in that case at 370 is applicable:

> "It is the kind of evidence in respect of which any jury is at a disadvantage in a complicated case involving many disputed allegations of fact and a correspondence extending over many months. It can hardly be said that the jury lost sight of the

> documents because they barely see them. It is not surprising in the circumstances that ... [a jury] may have failed to notice the compelling significance of the written word".

The powers of this Court

[77] At common law an appellate court which set aside a jury's verdict could only enter judgment for the appellant if there was no evidence on which a jury could find for the party with the legal onus of proof.

[78] However in England, following the Judicature Act, rules of court increased the powers of the Court of Appeal when the verdict of a jury has been set aside as unreasonable and perverse. The significance of the "new" rules was referred to by Lord Atkinson in *Banbury v Bank of Montreal* [1918] AC 626, 675-9.

[79] Lord Atkinson said that the "new" rules, which have been adopted in Tonga, enabled the appellate court "to do complete justice between the parties" (p 676), so that if the Court "had all the facts before them they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff" (p 676), and to do so when they were "satisfied that no jury could properly come to a different conclusion (p 677). In

particular the Court can enter judgment for the plaintiff "where there is conflicting evidence in a case, but an overwhelming balance of it on one side" (679).

[80] These principles were referred to in *Hocking v Bell* (1945) 71 CLR 430, 441 by Latham CJ and at 497-8 by Dixon J whose judgments were approved by the Privy Council on appeal (1947) 75 CLR 125, 130,132.

[81] The relevant post Judicature Act rules of Court are reproduced in the Court of Appeal Rules. Order 8 r 1 (1) provides that "an appeal shall be by way of rehearing", and r 1 (4) provides that "The Court may draw inferences of fact and give any judgment or make any order which ought to have been given or made, and may make such further order as the case may require".

[82] In our judgment the documentary evidence and the oral evidence of Pw1 and Pw2, for the reasons appearing above, is such that this Court is fully justified in exercising its powers under order 8 r 1 and entering judgment in favour of the Bank for money lent excluding the drawbacks of $153,475.50 [27] and interest thereon.

The orders of this Court

[83] Counsel for the Bank provided the Court with a recalculation of the debt due to the Bank commencing with the Bank statement balance on 30 November 2006, with simple interest thereon at 12.5% (not compound interest with monthly rests which was the Bank's contractual entitlement) allowing credit for the payment of $100,000 on 22 February 2008 including loan administration charges of $17,920 and late payment fees of $5600. The total amount claimed was $986,153.72.

[84] Mr Edwards SC objected to the claim for loan administration fees and late payment fees but did not otherwise challenge the mathematics behind the Bank's claim.

[85] We see no reason for rejecting the Bank's claims for loan administration and late payment fees.

[86] The Court makes the following orders:

1. Appeal allowed;
2. Judgment of the Supreme Court set aside;

3. In lieu thereof enter judgment for the Bank for $986,153.72 with effect from 28 March 2016, such judgment to carry interest at the rate of 10% per annum from that date;

4. The respondent to pay the appellant's costs of the trial and in this Court.

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Moore J

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Handley J

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Blanchard J

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Tupou J