

**IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY**

**AC 5 of 2016
[LA 14 of 2013]**

**BETWEEN : 1. SIOSAIA H. FONUA
2. MARY PREM FONUA
- Appellants**

**AND : WESTPAC BANK OF TONGA
- Respondent**

**Coram : Moore J
Blanchard J
Hansen J
Tupou J**

**Counsel : Mr. L. M. Niu SC for the Appellants
Mrs. D. Stephenson for the Respondent**

Date of Hearing : 5 September 2016

Date of Judgment : 14 September 2016

JUDGMENT OF THE COURT

Introduction

- [1] The appellants (Mr and Mrs Fonua) appeal against the judgment of Scott J dated 6 May 2016 in which he dismissed their counterclaim against the respondent (the Bank).

Background

- [2] Mr and Mrs Fonua entered into a loan agreement with the Bank on 9 March 2007. The loan was secured over their leasehold land. They fell into arrears and, on 13 June 2013, the Bank issued a notice under s109 of the Land Act [Cap 132] claiming the sum of \$379,202.94. Subsequently the Bank applied for summary judgment seeking a declaration that it was entitled to possession of the leasehold land, the building and fixed improvements secured by the mortgage. Mr and Mrs Fonua counterclaimed. They claimed the amount they had been called upon to pay the Bank had been inflated by 'unlawful' charges which they had been unable to pay. The actions of the Bank were said to have been the cause of their default.

[3] On 6 March 2015 Scott J sitting as a Judge of the Land Court found that Mr and Mrs Fonua were in default under the mortgage. He made orders declaring that the Bank was entitled to possession of the land and requiring Mr and Mrs Fonua to give vacant possession within 28 days. An appeal against his judgment failed. This Court rejected an argument that Mr and Mrs Fonua were not in default under the mortgage. It also rejected a submission that the Land Court did not have jurisdiction to deal with other aspects of the controversy between the parties. The proceeding was remitted to the Land Court for determination of the remaining issues including Mr and Mrs Fonua's counterclaim.

[4] The hearing took place before Scott J and an assessor. The sole issue remaining for determination was the counterclaim. The basis for the counterclaim is conveniently summarized at paragraph [11] of the judgment:

"Put briefly, the Defendants' case was that the Bank had "unlawfully" charged:

- (i) Loan administration charges;
- (ii) Late payment fees;

- (iii) Interest; and
- (iv) Legal fees.

As a result of making these unlawful charges the amount claimed by the bank to be owed to them had been unlawfully inflated to an amount which was "impossible" for the Defendants to repay and which "directly caused them to default on their monthly repayments by stopping those payments". In paragraph 12 of the counterclaim the Defendants state that:

"They reasonably made the decision to stop paying the required monthly payments because that was all that they could do".

.....

In paragraph 14:

"The unlawful action of the Plaintiff has directly caused the loss of the lease and of the dwelling house of the Defendants worth in excess of \$300, 000 at the time of repossession thereof by the Plaintiff".

[5] After considering the evidence of Mr Fonua, who said he stopped making repayments to the Bank "because the balance kept growing", and an officer of the Bank, the Court held that the charges and interest in dispute had been

\$200,000, the price at which the Bank would have been prepared to sell the house to them or their nominee in order to resolve a longstanding dispute. They declined the Bank's offer. But they did not lose anything as a result of the action then taken by the Bank to realise its security. The house sold for \$180,000. It was the best offer received. There can be no suggestion it was sold at an undervalue. The proceeds of sale have been applied to reduce Mr and Mrs Fonua's indebtedness. The Bank's enforcement action has resulted in the loss of their house but not in any diminution in their net assets.

- [8] Although this is sufficient to dispose of the appeal, it may be of assistance if we indicate our view in relation to the charging of interest. It is the critical link in the chain of causation relied on to establish the counterclaim. Mr Niu acknowledged that it is the interest charged, not the other costs, which increased indebtedness to a level which, on Mr and Mrs Fonua's case, caused them to stop making repayments.

[9] The Bank's practice was to compute interest on the outstanding balance of the account monthly, then debit it to the customers' account. If the interest was not paid the following month, it would be added to the outstanding balance and interest calculated on any unpaid interest as well as unpaid principal. Mr and Mrs Fonua have contended throughout that this practice is impermissible. They say the Bank has no right to change what Mr Niu described as compound interest.

[10] We do not agree. Sub-clauses 1 (f) and (g) of the memorandum of mortgage provide:

1. "The Mortgagor shall on demand duly pay to the Bank:

.....

(f) Also all money with which the Bank shall be at liberty to debit and charge the account of the Mortgagor under the covenants conditions or provisions herein contained.

(g) Also interest upon all such moneys as aforesaid or on so much thereof as shall for the time being be due or remain unpaid at the rate agreed upon in writing if any and in the absence of any such agreement then without prior or other notice to the Mortgagor at and after the prevalent rate charged or chargeable by the Bank for the time being or

from time to time to its other customers on a like account, such interest to be deemed to accrue from day to day and to be computed from the time or respective times of such moneys being paid or disbursed or becoming due and at the end of every month or on such other days as the Bank may from time to time determine the interest due as aforesaid and all such interest may at the option of the Bank at any time after the end of such month as aforesaid be debited to the account of the Mortgagor or to for or on account of any other person as aforesaid or for the payment of which the Mortgagor is otherwise liable to the Bank as hereinbefore sated to the account of the Mortgagor and such debiting of interest may and the provisions herein contained as to the moneys on which interest is payable shall be continued notwithstanding that as between the Bank and the Mortgagor or such other person as aforesaid the relationship of Banker and customer may have ceased and notwithstanding the death insolvency or incapacity of the Mortgagor or of such other person as aforesaid and notwithstanding any other matter or this whatsoever until all moneys hereby secured shall have been paid and satisfied. All of which moneys liabilities and interest as aforesaid are intended to be secured by these presents and are hereinafter referred as the Moneys Here by (sic) Secured".(emphasis added)

[11] The emphasised passage in sub-clause 1(g) expressly authorises the Bank to compute interest on the amount due at the end of each month and to debit such interest to the


Mortgagor's account. By sub-clause 1(f) money so debited is payable on demand. There is, then, clear authority for the Bank to charge interest in the way it did.

[12] We acknowledge that the Bank's entitlement to charge for loan administration and late payment fees is not as clearcut. However, as the sums involved in aggregate were relatively modest, they could not, as Mr Niu acknowledged, have, by themselves, supported the counterclaim. It follows that even if Mr and Mrs Fonua had been able to establish loss as a result of the Bank's enforcement actions, they could not have shown that the Bank was responsible.

[13] Nothing we have said should be taken as expressing a view that, where a lender may have miscalculated the balance owing of a loan, but there is still a balance outstanding, it is permissible to suspend payment of covenanted principal and interest instalments.

Result

[14] The appeal is dismissed. The appellant is entitled to costs to be taxed if not agreed.



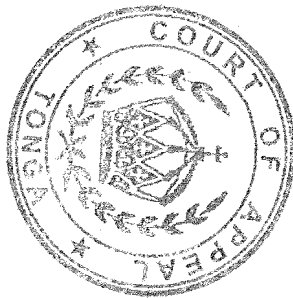
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Moore J



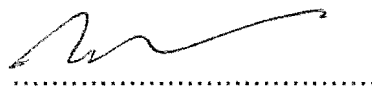
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Blanchard J



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Hansen J



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Tupou J