

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

AC 2 of 2016  
[LA 13 of 2015]

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**BETWEEN:** 1. VA'A TOLOKE a.k.a SOLOMONE LATU TOLOKE  
2. MARYANNE TOLOKE

- Appellants

**AND:** AUSTRALIA & NEW ZEALAND BANKING GROUP LTD

- Respondent

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

**Counsel** : Mr. S. Tu'utafaiva for the Appellants  
Mr. W. Edwards for the Respondent

**Date of Hearing** : 7 September 2016

**Date of Judgment** : 14 September 2016

## JUDGMENT OF THE COURT

- [1] Australia & New Zealand Banking Group Ltd holds a registered mortgage by way of lease over Mr. Toloke's town allotment at Veitongo. That mortgage is dated 19 May 2004 and was registered by the Minister of Lands on 18 January 2005. The Deed of Grant held by the bank is endorsed accordingly by the Ministry. The mortgage is expressed to be for 30 years from 19 May 2004. That is the longest term permitted under the Land Act for a mortgage lease: s.100. The evidence for the bank in the Supreme Court is that it invariably insists on taking such mortgages for a full 30 year term.
- [2] Mr. Toloke and his wife, to whom the bank made joint advances for housing purposes related to the land, claim however that they never agreed to more than a 7 year term and that the signature of Mr. Toloke appearing on the mortgage and on the application for its registration by the Minister are forgeries. They say that a mortgage was signed by Mr Toloke but it was for 7 years only and was not the document which the bank now relies upon in seeking an

order for possession now that the Tolokes have made default by failing to repay the loan.

[3] The bank sought and received summary judgment in the Land Court against the Tolokes. Lord Chief Justice Paulsen, in his capacity as Lord President, did not believe the affidavit evidence of Mr and Mrs Toloke and was satisfied that the Tolokes had no arguable defence to the bank's claim. He ordered them to deliver up vacant possession of the land in the Deed of Grant within 14 days. Mr and Mrs Toloke appeal against that decision saying that this was not a suitable case for summary judgment.

[4] Most of the facts are not in dispute. The only question is whether the mortgage which was registered and is now relied upon by the bank is the document Mr. Toloke admits he signed in 2004. We have already set out the basic facts. But it also needs to be mentioned that the housing loan was restructured in 2008 after default by the Tolokes. The bank's letter of offer of 24 April 2008 recorded that the amount of the loan then outstanding was TOP\$239,176 which would now be repayable with interest by monthly instalments over a 5 year term running from 31 May 2008. The letter of offer

referred to the fact that the bank held a first registered mortgage over the land but the letter did not propose any variation of its terms and conditions.

[5] If the contention of the Tolokes were to be accepted, the bank must have been content in 2008 to extend the term of the housing loan to 2013 despite the expiry date of its mortgage being in 2011. In other words, the Tolokes are saying that their loan was to be unsecured for the final 2 years. That unusual arrangement is nowhere mentioned in the 2008 letter of offer.

[6] After further defaults the bank demanded repayment on 3 February 2011 and issued proceedings in the Supreme Court seeking judgment for the outstanding balance of the housing loan and other amounts owing in respect of business loans. On 10 October 2014 Scott J gave summary judgment against the Tolokes for sums including TOP\$120,087.89 in respect of the housing loan indebtedness. Because that was not paid the bank has sought to enforce its security over the land.

## The judgment below

- [7] The Lord President helpfully set out the guiding principles of summary judgment. To these we add what this Court said in *Moehau v Westpac Bank of Tonga* [2013] Tonga LR 71 at [17]:

*Under Order 15 rule 2 and comparable rules in other jurisdictions a defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail. The Supreme Court must be satisfied, in other words, that the asserted defence has no prospect of succeeding at trial. In a case in which there is a factual contest it may not be proper to enter summary judgment and deprive the defendant of the exercise of the right to a trial. But merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statement by the same deponent or inherently improbable in itself it may be" :Eng Mee Yong v Letchumanan [1980] AC 331 (PC) at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.*

[8] The President carefully went through and analysed the evidence given for the Tolokes. He noted the acknowledgement given that a mortgage (said to be for 7 years) had indeed been signed. Mr Toloke had deposed that the signature on the 30 year mortgage was not his. He said he signed himself as "V. Toloke", not "S. Toloke" as on the mortgage relied on by the bank. He said he was not given copies of the signed documents. He had requested a copy in 2008 when he said he was approached by the bank to sign new loan documents because all of the loan documentation had been destroyed in the riot in 2006.

[9] There was an affidavit from Mrs. Toloke who did not accept that her husband could have signed a mortgage for 30 years. She had done the negotiations for all the Tolokes' loans. Part of the discussion with the bank in 2004 was for the mortgaging of the land to be for the same term as the term of the loan, namely 7 years. The bank had never told them the mortgage would be for 30 years. She too said there had been a request for re-signing of documentation in 2008 because documents had been burnt in the riot.

[10] The Tolokes also put forward an affidavit from a former employee of the bank, Mrs Heta Tupou, who said that in 2004 she was looking after the loan accounts of the Tolokes at the bank. She recalled a housing loan but says she was not the witness to Mr. Toloke's signature on the bank's documents. She said that the signature of the witness was similar to her's but was not her signature. She also said that Mr. Toloke's purported signature on the mortgage differed from his signature on a letter of offer in 2004. She further said there had been departures from usual banking practices in that the name of the bank officer who witnessed the mortgagor's signature was not printed next to the signature of the witness; and variations of the loan had not been recorded as variations of mortgage.

[11] The President reminded himself of the onus of proof and the summary judgment principles. But he said he had come to a very clear view that the onus had been satisfied by the bank. He considered that the defence raised by the Tolokes was both inherently improbable and contrived. The suggestion that the bank had Mr. Toloke sign mortgage documents but then forged and registered other mortgage documents, apparently for no other reason than to alter the term of the

mortgage to 30 years, was demonstrably improbable. The signatures on Mr. Toloke's affidavit and on the 2004 and 2008 loan offers (all of which he did sign) were "strikingly" similar to that on the mortgage. We pause to say that we too have looked carefully at the signatures. We fully agree with the President about their similarity.

[12] The President said that it was inconceivable that the bank should provide the Tolokes with a loan of more than TOP\$200,000 repayable over 7 years and take as a security a mortgage for a term of only 7 years because of the grave risk of holding no or inadequate security in the event of a default. The undisputed evidence of the Lending and Security Administrator of the bank was that it was the bank's policy only to take mortgages for the full term allowable under the Land Act of 30 years. The mortgage in this case was for the full term of 30 years "like every other Mortgage registered with the Ministry of Land over Town Allotment land". The Tolokes had had a number of loans with the bank and security had been taken by way of mortgage over other interests in land. They had produced no evidence that in any other case the bank had agreed to a term of less than 30 years.



[13] The judge said that it was significant that after the restructure in 2008, if the Tolokes were correct, the bank would have held no security for the last 2 years of the loan.

[14] No benefit was obtained by the Judge from the evidence of Mrs. Tupou. She had said that she did not witness the signature of Mr. Toloke and therefore could not say whether he signed the mortgage or not. The bank had not asserted that she was the witness. Her view that Mr. Toloke's signature on other documents was different was "inadmissible and mischievous". The fact that a witness did not print his name was not evidence of fraud. As the Lending and Security Administrator had said, there was never a need for a variation of mortgage. Mrs. Tupou had said she did not recall the bank having a Deed of Grant to the land with an endorsement for 30 years, but the bank did hold a deed of grant and had held it in 2005 when the mortgage was registered. (We comment that it does not appear that the term of a mortgage lease is normally shown on the endorsement of the registration.)

[15] For these reasons, the President found there was no arguable defence.

### **This appeal**

[16] The argument for the Tolokes on this appeal essentially was that the President ought not to have resolved a factual dispute about Mr. Toloke's signature without a full hearing at which there could be cross-examination of the witnesses. There was a dispute about whether the signature of Mr. Tolokes had been forged. The Tolokes should have been given the opportunity of obtaining expert evidence about that. The evidence of Mrs. Tupou, said to be an independent witness, should not have been set to one side, as had been done.

[17] But, as the passage from *Moehau* and other authorities cited by the President make clear, the court is not bound to accept inherently improbable defence evidence claimed to give rise to a factual dispute. The President's analysis, which we respectfully agree with and adopt, shows how improbable it was that the bank would ever have agreed to a 7 year term for the mortgage in the first place and even more improbable that, if it had actually done so, it would have been content to

extend the loan in 2008 beyond that 7 year term without a new mortgage, particularly after a default. Against that background, the President did not have to accept that there might be a doubt about whether Mr. Toloke had signed the registered mortgage. He did not believe Mr. Toloke's claim of forgery and nor do we.

[18] The affidavit of Ms. Tupou proves nothing at all. She says she was not the witness so she cannot say whether Mr. Toloke was the signatory.

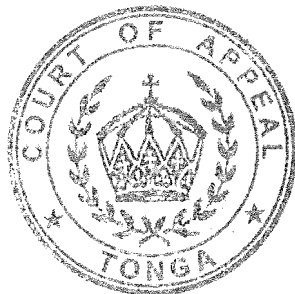
[19] The bank was said by the Tolokes to have asked for new mortgage documentation in 2008 but none was sought in the 2008 letter of offer and the evidence for the bank was that the branch at which the Tolokes' documentation was kept was not damaged in the fire after the riot.

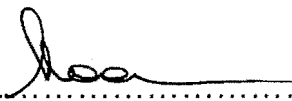
[20] The Tolokes were accusing the bank of fraudulent conduct. Their accusation was not supported by the evidence apart from Mr. Toloke's claim that the signing of his name on the mortgage was a forgery. In such circumstances the Tolokes could have been expected to provide expert evidence from a document examiner as part of the evidence resisting the


bank's application for summary judgment. The bank's application was made early in October 2015. It was not heard in the Land Court until the end of January, nearly 4 months later. Even allowing for the Christmas holidays, there was ample time to engage the services of an expert, or at least to seek further time to do so. No such step was taken. In circumstances where the claim of forgery was, on the evidence before the Court, not believable, the Court was entitled to proceed to enter summary judgment.


**Result**


[21] We are not persuaded that the President was wrong to enter summary judgment and we dismiss the appeal with costs to be taxed if not agreed upon.



  
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**Moore J**

  
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**Blanchard J**

  
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**Hansen J**

  
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**Tupou J**