• Breach of contract
• undue influence

IN THE COURT OF APPEAL OF TONGA **APPEAL NO.8/99**
NUKU'ALOFA REGISTRY

BETWEEN : ***SIUA FONUA*** - ***Appellant***

AND : ***MBf BANK LIMITED*** - ***Respondent***

Coram : Burchett J
: Tompkins J
: Beaumont J

Counsel : Mr Tu'utafaiva for Appellant
: Mr Waalkens for Respondent

Date of hearing: 14th July 2000.
Date of judgment: 21st July 2000.

Judgment of the Court

This is an appeal by a Plaintiff who was unsuccessful in an action claiming breach of contract and undue influence against the Respondent, a bank. The Appellant's counsel faced an impossible task, for the alleged breach, the alleged undue influence, and the alleged loss all depended on the oral evidence of witnesses who gave evidence before the trial judge. But the judge described the Appellant, whose own evidence was crucial to his case, as "at best ... unclear and inconsistent in his evidence ... and evasive and dishonest at the worst". He expressly rejected the Appellant's evidence that he had entered into an agreement of 16 December 1997, with one Lee, as a result of conduct of the bank - conduct which was alleged to have constituted both a breach of its contract with him, and also the exertion of undue influence upon him. His Honour held : "I simply do not believe the plaintiff in that regard" ; and "I am satisfied beyond any doubt the plaintiff made that [agreement] voluntarily and willingly ... ." His Honour went on to describe the claim as "bogus".

Furthermore, the judge accepted Lee's evidence which showed the appellant had suffered no loss at all by reason of his entry into the agreement of 16 December 1997, but, on the contrary, had profited by it to the extent of $10,000.

It is unnecessary to set out the facts in detail. They are fully stated in the judgment under appeal. In summary, the Appellant and Lee decided to buy certain electrical goods for resale at a profit. Lee secured a contract of purchase at $124,100.00, and they applied to the bank for a loan. The bank made a loan to the Appellant (by agreement concluded between it and him on 21 November 1997) upon terms including the making of a cash deposit by Lee, the granting of a mortage by the Appellant over a property at Matahau and the granting of a security over the goods to be purchased. The loan was to be repaid by instalments, of which the first, in the sum of $5,000, was to be paid on 21 December 1997. The agreement of loan included a not unusual provision enabling the bank to call up the loan, among other things, if "the borrower ceases or threatens to cease to carry on its business", or if "a material change has occurred in the financial conditions of the Borrower which in the opinion of MBfBL [the bank] is likely to prejudice the ability of the Borrower to perform its obligations under [the agreement] in accordance with [its] terms", or if "in the opinion of MBfBL, the Borrower is not carrying on its business and affairs in accordance with sound financial and industrial standards and practices".

Obviously, any persistence by the Appellant, before any of the goods had been resold, in litigation against his joint venturer Lee, so as to destroy the basis of the joint venture, could be regarded by the bank as triggering one or more of the terms we have set out. That is what happened. The Appellant brought proceedings against Lee which disrupted the arrangements previously made for the resale of the goods. The bank then made it clear to the Appellant that if his action was not settled satisfactorily, the bank would apply to the court for an order. It was this warning which the Appellant now says amounted to a breach of contract and to the exertion of undue influence.

In fact, the Appellant, within days, entered into the agreement of 16 December 1997, which was in settlement of his action. The settlement yielded him a payment of $10,000 and the release of the bank's security over his property, while Lee retained the goods and took over the obligation to repay the bank. The agreement was drafted by the Appellant's own lawyer. It involved his gaining something the trial judge found he particularly desired, relief from anxiety about the mortgage, which affected his house.

In these circumstances, and having regard to his Honour's estimation of the witnesses, there is just no basis for a finding that the bank's warning to the Appellant should be characterised as he alleges. Nor can there be any basis for

awarding any damages or compensation, in the face of the accepted evidence of Lee that the resale of the goods had not proved to be profitable. The judge, who disbelieved the Appellant, was entitled to refuse to accept his expectation of profit as establishing that a profit would actually have been earned by him.

The final issue is costs. The learned Chief Justice, who was the trial judge, awarded costs to the Respondent on the solicitor and client basis. He did so because the Appellant had persisted in "a thoroughly worthless action", after notice in the pleadings that such a costs order would be sought, and after being given an opportunity to discontinue without paying costs. Plainly, such an order is exceptional ; but it is an exceptional case. A claim of this kind causes needless expense and embarrassment, and waste of the resources that society puts into the Court. In our opinion, his Honour was entitled to exercise his discretion as he did. For the same reasons, this Court dismisses the appeal with costs to be taxed as between solicitor and client.

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Burchett J

COURT OF APPEAL
FIJI

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Tompkins J

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Beaumont J