

**BETWEEN: AUSTRALIA & NEW ZEALAND BANKING  
GROUP LIMITED**

**- Plaintiff**

**AND: VA'A TOLOKE a.k.a. SOLOMONE LATU  
TOLOKE**

**- First Defendant**

**MARYANNE TOLOKE both trading as  
TOLOKE ENTERPRISES**

**- Second Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Hearing : 29 January 2016.**

**Date of Ruling: 4 February 2016**

**Counsel : Mr. W. Edwards for the plaintiff  
Mrs. F. Vaihu for the defendants**

**RULING**

[1] The plaintiff is a bank. It says it holds a registered mortgage (the Mortgage) over the land of the first named defendant, Solomone Latu Toloke, as security for a housing loan made to Mr. Toloke and his wife. As the defendants are in default of the terms of the housing loan the plaintiff, as mortgagee, seeks an order for possession of the land. The plaintiff has applied for summary judgment which is opposed by the defendants.

**The issue**

[2] The defendants filed an amended statement of defence and amended notice of opposition to the summary judgment application shortly before the hearing. These reduced the matters in dispute to a single issue. Mrs. Vaihu confirmed that the defendants allege that the Mortgage is a forgery and cannot therefore be enforced. They argue that the Court should not seek to make any finding whether the Mortgage is a forgery on a summary

judgment application and that the case should proceed to trial in the ordinary way.

**Summary judgment principles**

- [3] As I have noted on other occasions, the principles governing summary judgment applications are well known. The purpose of the rules allowing summary judgment applications to be made is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried (*Anglo-Italian Bank v Wells* (1873) 38 L.T. 197 and *Westpac Bank of Tonga v Moehau* (Unreported Supreme Court of Tonga, CV 120 of 2011, 26 October 2012 Scott CJ).
- [4] The onus is on the plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defence the defendant will need to respond if the application is to be defeated.

[5] Relevantly, in a case such as this, whilst the Court will not normally seek to resolve conflicts of evidence or assess the credibility of witnesses the Court will not accept uncritically evidence that is "inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable" (*Krukziener v Hanover Finance Limited* [2008] NZCA 187at [26] and *Eng Mee Yong v Letchmanan* [1980] AC 331, 341). The Court may take a robust and realistic approach when the facts warrant it (*Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)).

[6] Recently in a New Zealand context in *Bell v Bell* [2015] NZHC 3059 Osborne AJ helpfully set out the general principles that apply to summary judgment applications as follows:

[27] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

(c) The Court will not hesitate to decide questions of law where appropriate.

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may

be required for the protection of the integrity of the summary judgment process.

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

**The facts**

[7] In May 2004 the defendants applied for and were granted by the plaintiff a housing loan for TOP\$220,000. The loan was initially for a term of seven years. Security was to be taken by way of a registered mortgage over Mr. Toloke's land, which is 1,518 square metres being Lot 8 on Survey Plan 6027 and all the land contained in Deed of Grant No. 372 Folio 67.

[8] The plaintiff produced into evidence an Application for Mortgage to the Minister of Lands dated 19 May 2004 and a Memorandum of Mortgage of the same date. The term of the Mortgage is stated to be for 30 years from

18 May 2004. Both documents are apparently signed by Mr. Toloke although he denies that.

[9] The Mortgage was registered on 18 January 2005. The duplicate copy of the Deed of Grant with the endorsement of the memorial of registration of the Mortgage on its reverse side was provided to the Court at the hearing.

[10] The housing loan was restructured in 2008. The plaintiff says that this was as a result of defaults by the defendants. The signed Letter of Offer from the plaintiff to the defendants dated 24 April 2008 stated that the amount then outstanding under the housing loan was TOP\$239,176 and that this sum was repayable with interest over a 5 year term by monthly payments of TOP\$5,600 commencing on 31 May 2008. The Letter of Offer also records that the plaintiff held a first registered mortgage over the land.

[11] As a result of further defaults by the defendants the plaintiff made written demand upon them on 3 February 2011 for repayment of the housing loan, as well as other loans. When the loans were not repaid

proceedings were filed against the defendants in the Supreme Court under CV 7 of 2012 seeking judgment for the amounts outstanding. On 10 October 2014 Scott CJ. entered summary judgment against the defendants for sums which included TOP\$120,087.89 owing under the housing loan together with interest and costs. No part of the judgment sum has been paid and the plaintiff now seeks to enforce its security.

**The plaintiff's evidence**

[12] It is not necessary for me to set out the plaintiff's evidence at this point as the only matter in issue is whether the Mortgage is a forgery.

**The defendants' evidence**

[13] Both defendants have filed affidavits and there is an affidavit from Heta Maliana Vahe Tupou, a former employee of the plaintiff.

[14] The kernel of the defendants' case is that, whilst they admit that the housing loan was to be secured by way

of a registered mortgage over the land, they say that Mr. Toloke did not sign the Mortgage and that the term of the Mortgage was to be for just seven years and not 30 years.

- [15] With surprising brevity Mr. Toloke, in his affidavit, acknowledges that he and his wife applied for a housing loan in an amount of TOP\$220,000 to build a dwellinghouse on the land. The term of the loan was seven years. He acknowledges also that there were mortgage documents signed to grant the plaintiff a mortgage over his land but, he says, the mortgage documents he signed were for a term of only seven years. He says he was not given a copy of the documents. He also says that the signature on the Mortgage is not his signature as he signs his name 'V Toloke' and not 'S Toloke'. He states that he does not recall being given a copy of the mortgage documents in 2008, despite requesting them, when the plaintiff approached the defendants to sign new loan documents because all of the plaintiff's loan documentation was destroyed in the riots.

[16] The evidence of Mrs. Toloke was that she refuses to accept that her husband would have signed a mortgage for 30 years. She says that she was the one who negotiated all their loans and when applying for the housing loan in 2004 part of the discussion was that the mortgage would be for the same term as the loan and that the plaintiff never told them that the mortgage would be for 30 years. She also said that in 2008 the plaintiff requested that loan documents be re-signed because its documents got burned in the riots but that no mortgage documents were signed at that time.

[17] In her affidavit Heta Tupou says that she was employed by the plaintiff between 1999 and 2007 and that in 2004 she was looking after the loan accounts of the defendants. She recalls the defendants taking out a housing loan but she does not recall witnessing the signature of Mr. Toloke to the Application for Mortgage or Mortgage and that the signature of the witness to the Mortgage appears similar to but is not her signature. She says that the signature that purports to be Mr. Toloke's signature on the Mortgage differs from one that appears on a letter of offer dated 26 October

2004 (which was produced by Mr. Toloke in his affidavit) which she is "able to identify instantly". She also says that there have been departures from usual banking practices in two respects. First, the Bank Officer witnessing the mortgagor's signature to the Mortgage has not printed his name next to his signature. Secondly, variations of the loan have not been recorded as variations of mortgage.

[18] Finally, Ms Tupou says that she did not recall ever having seen the Deed of Grant to the land in the Bank with an endorsement for a 30 year mortgage upon it.

### **Discussion**

[19] I have reminded myself that it is the plaintiff that bears the onus to show the absence of any arguable defence and that ordinarily the Court will not attempt to resolve factual disputes on a summary judgment application.

[20] I have come to the very clear view that the plaintiff has satisfied its onus and is entitled to the relief it seeks. I consider that the defence raised by the defendants is

both inherently improbable and contrived for the reasons that follow.

[21] The defendants acknowledge that they applied for the housing loan in May 2004 and the first defendant admits that the housing loan was to be secured by mortgage and that mortgage documents were signed. Consistent with this the Application for Mortgage and Memorandum of Mortgage were dated 19 May 2004 and the Mortgage was registered in January 2005. To suggest that the plaintiff would have Mr. Toloke sign mortgage documents but then forge and register other mortgage documents, apparently for no other reason than to alter the term of the Mortgage from seven years to 30 years, is demonstrably improbable.

[22] Whilst Mr. Toloke says that the signature on the Mortgage is not his, the signatures on his affidavit, on the loan offer of 26 October 2004 and on the letter of offer of 24 April 2008 (all of which he did sign) are strikingly similar to that which appears on the Mortgage.

- [23] In their statement of defence the defendants plead that the mortgage was to expire in 2013. That is not seven years from the date that the housing loan was taken out. The housing loan was restructured in 2008 and the term of the loan extended to 2013. This is important not only because it impacts on the defendants' credibility but also because there is, in effect, an acknowledgment from the defendants that the Mortgage was for a term that was greater than seven years.
- [24] It is also inconceivable in my view that the plaintiff would provide the defendants with a loan of more than TOP\$200,000 repayable over seven years and take as security a mortgage for a term of only 7 years. The purpose of the Mortgage is to provide security for the plaintiff in the event of default by the defendants, which could occur at any time during the term of the loan. A mortgage for a term of only 7 years puts the plaintiff at very grave risk of holding no or inadequate security in the event of a default. Furthermore, the undisputed evidence of Sosefo Halahingano, the Lending and Security Administrator of the plaintiff, was

that it is the plaintiff's policy only to take mortgages for the full term allowable under the Land Act which is 30 years. He also said that the Mortgage in this case was for the full term of 30 years "like every other Mortgage registered with the Ministry of lands over town allotment land."

[25] Related to this point, the defendants have had a number of loans with the plaintiff and security has been taken by way of mortgage over other interests in land. The defendants have produced no evidence that in any other case the plaintiff has agreed to a mortgage for a term of less than 30 years nor have they produced any documents whatsoever that suggest that the Mortgage was granted for a term of less than 30 years.

[26] It is significant that when the housing loan was restructured in 2008 the term of the loan was extended until 31 May 2013. If the defendants are correct, and the mortgage was for just seven years, the plaintiff would have held no security for the last two years of the term of the loan. Clearly that is not what the

parties understood to be the case nor is it likely to have been something the plaintiff would accept.

[27] I have obtained no benefit from the evidence of Heta Tupou. Ms. Tupou says she did not witness the signature of Mr. Toloke to the Mortgage and is therefore in no position to say whether he signed it or not. Her evidence that the signature of the witness is not her signature is peculiar as the plaintiff did not assert that it was her signature. Her view that Mr. Toloke's signature on other documents is different from the signature on the Mortgage is both inadmissible and mischievous.

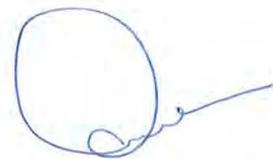
[28] In so far as Ms. Tupou purports to comment on banking practice, the fact that a witness does not print his name under his signature is not evidence of fraud nor does it invalidate the Mortgage and, as Mr. Halahingano has stated in his evidence, there was never any need for the plaintiff to register a variation of the Mortgage.

[29] Finally, Ms. Tupou's evidence that she does not recall the plaintiff having the Deed of Grant to the land with an endorsement for 30 years is somewhat enigmatic.

Clearly the plaintiff does hold the Deed of Grant and did hold it also at the time the Mortgage was registered in 2005.

**The result**

- [30] The plaintiff has satisfied me that the defendants have no arguable defence to its claim. The plaintiff is entitled to the relief that it seeks.
- [31] I hereby order the that defendants are, within 14 days of service of this ruling upon them, to deliver up to the plaintiff vacant possession of the land contained in Deed of Grant No. 372 Folio 67.
- [32] The plaintiff is entitled to costs which are to be fixed by the Registrar if not agreed.



**NUKU'ALOFA: 4 February 2016.**

**LORD CHIEF JUSTICE**