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IN THE LAND COURT OF TONGA **LA 14 of 2013**
NUKU'ALOFA REGISTRY

BETWEEN : **WESTPAC BANK OF TONGA**

- **Plaintiff**

AND : **SIOSAIA H. FONUA**

- **First Defendant**

AND : **MARY PREM FONUA**

- **Second Defendant**

Before Mr Justice M. D. Scott and Mr Assessor S. Toumo'ua

Mrs D. Stephenson for the Plaintiff
L. M. Niu SC for the Defendants

JUDGMENT

INTRODUCTION

[1] In July 2013 the Plaintiff issued proceedings for possession of land, buildings and other fixed improvements which had been mortgaged to the Plaintiff by the Defendants in March 2007. In June 2013 the Plaintiff had purportedly issued a notice pursuant to Section 109 of the Land Act stating that the Defendants owed the Plaintiff $379,202.94. No repayment was made but the Defendants refused to vacate the land.

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[2] In August 2013 a Statement of Defence was filed. In paragraph 13 it was stated that the Plaintiff had breached the terms of the mortgage by charging interest at too high a rate and by calculating the same on a daily basis. In the premises the Defendants were entitled to cease making monthly repayments under the mortgage and the Defendants were not lawfully indebted in the sum of $379,202.94.

[3] In August 2013 the Plaintiff commenced proceedings for possession pursuant to the Personal Property Securities Act 2009. Those proceedings came to an end in April 2014 in the Court of Appeal (AC 16 of 2013).

[4] In February 2014 the Plaintiff applied for summary judgment. Paragraph (iv) of the application stated that the Defendants had no arguable defence to the Plaintiff's claim.

[5] In June 2014 the Defendants sought leave to amend their Statement of Defence and to counterclaim.

[6] In March 2015 I granted the application for summary judgment: it was declared that the Plaintiff was entitled to possession of the land and the Defendants were ordered to give vacant possession in 28 days.

[7] In my Decision dated 6 March 2015 paragraphs 22 and 23 I expressed the view that the order for possession could not encompass the dwelling house nor the debt claimed by the Plaintiff

but that those issues would have to be resolved in the Supreme Court.

[8] In September 2015 the Court of Appeal dismissed an appeal against the summary judgment. Importantly, at paragraph 10 of the judgment the Court stated:

> "In our opinion, if the jurisdiction of the Land Court is lawfully invoked by a party initiating proceedings against another party then that court has jurisdiction to resolve the entire legal controversy between those parties at least if the legal controversy concerns land and matters incidental or related to that land".

In paragraph 18 it stated:

> "The Land Court should have determined the application before it by Westpac insofar as it raised issues about possession of the dwelling house and should also have dealt with the Counterclaim".

Those matters were remitted to the Land Court for disposal.

[9] In November 2015 this Court was advised that the Defendants had vacated the house on the land and on 11 November 2015 the following order was made by consent:

> "The Plaintiff is lawfully entitled to possession of the dwellinghouse and fixed improvements on the land comprised in registered lease number 4037".

The only remaining matter therefore was the Counterclaim.

PLEADINGS

[10] On 23 November 2015 a further amended and final Statement of Counterclaim was filed by the Defendants. A Defence to the Counterclaim was filed in December 2015.

[11] 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 Defendant's 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 13 the Defendants state that:

> "The decision of the Land Court and the Court of Appeal does not deprive them of their right to claim damages for the breach by the Plaintiff of their loan agreement as aforesaid".

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".

[12] The Defence to the Counterclaim denied that the various charges and the rate and mode of calculation of the interest were unlawful. It referred to an acknowledgment of indebtedness by the First Defendant in 2009 and pleaded that the Defendants were now estopped from denying their level of indebtedness at that time. As for the Defendants' claim that they were justified in ceasing to make the monthly repayments under the mortgage the Plaintiff referred to and relied upon the Judgment of the Court of Appeal delivered in September 2015.

[13] In paragraph 10 the Court of Appeal had stated:

> "The Appellants were in default under the mortgage because as conceded by Senior Counsel they were contractually obliged to make periodic payments and ceased doing so in 2011. This constituted default and the fact that the Appellants were in dispute with Westpac about the total amount owing did not relieve them of the obligation to continue making periodic payments".

EVIDENCE

[14] The only witness called by Mr Niu was the First Defendant. He had prepared and filed a brief of evidence which he averred to be true.

[15] In paragraph 8 of his brief the First Defendant stated that the four charges complained of were unlawful because the loan agreement with the Bank did not authorise them. In paragraph 9 he stated that the effect of removing these charges would have been to reduce the debt to $201,147.22 "which we would have been happy to continue to pay" at the monthly rate of $3200. In paragraph 12:

> "At that time July 2012 we did not know that the charges were unlawful and we could not agree with the Bank about them. We simply asked the Bank to waive the interests or some of the interests so that the balance of our account was such that we could pay it off within a reasonable time of say 10 years. But the Bank refused to do that".

[16] In cross examination the First Defendant was asked about each of the charges to which he took objection. He accepted that the Loan Administration Charges had been wrongly calculated by him: the correct figure was $3840, not $32,000. He maintained that even these deductions were impermissible. As to late payment fees "I do not think the bank was permitted to charge those fees unless they are authorised by the mortgage". While he accepted that he was liable to pay interest under the mortgage "the way the bank applied the interest to the loan was incorrect: the mortgage document does not allow interest to be charged at 11.5%". Furthermore, the bank was not permitted to charge "interest upon interest". As to legal fees, the First Defendant stated that it was not his "responsibility to pay these fees, the bank is not allowed to charge them, I do not agree with having to pay these charges".

[17] In re-examination the First Defendant stated that he stopped making repayments to the bank "because the balance kept growing". After re-calculating, the deductions which he claimed to be unlawful amounting to $190,147.22 appearing in paragraph (a) of the prayer of the counterclaim should be replaced with a figure of $229,907.22.

[18] Answering questions from the Court it became clear that the term "interest upon interest" which the Plaintiff employed was another way of referring to compound interest. In the First Defendant's submission "unpaid interest should not be added to the principal sum due".

[19] The only witness for the bank was the Country Head of its successor BSP formerly Head of Business Banking with the Plaintiff. Mr Henson also produced a brief of evidence the contents of which he averred to be true.

[20] Mr Henson's evidence included a detailed account of the Defendants' dealings with the bank. On 9 March 2007, in consideration of a loan advance of $326,234 the Defendants executed a mortgage over their land. A copy of the mortgage is at pages 12 to 24 of Document 5 in a folder of documents tendered by consent. A clearer copy of the same document was also produced by consent and marked "B". It is signed by the Defendants. In paragraph 45 of his brief the witness stated:

"The interest, charges and fees were applied to the Defendant's loan account in accordance with the standard operating practices of the bank and according to the loan agreements and mortgage signed by the Defendants".

[21] Mr Henson was also shown Document 6, a Housing Loan Offer dated 18 August 2005 signed by the Defendants. Apparently there was a delay in issuing the lease and accordingly it was not until 2007 that the mortgage which was required as security for the loan was executed.

[22] Mr Henson referred to that part of the offer letter "Annual Percentage Rate" and to the words inserted in the adjacent box: "9 [%] the Annual Percentage Rate (APR) is a variable rate. Any change of interest rate will only affect the term and not the agreed repayment". The box "Lending Fees & Charges" will also be noted: "All Lending Fees & Charges" are as shown in the Bank's current "Lending Fees & Charges brochure". Document 6 was also referred to. This document, on its second page, shows that as at 30 June 2008 the interest on a housing loan was between 11.50% and 12.25%.

[23] Referring to Document "B" Mr Henson pointed first to paragraph 1(a) which requires the mortgagor to pay on demand "all moneys now or hereafter to become owing or payable to the bank by the Mortgagor".

[24] He then referred to paragraph 1(g) which he stated permitted the bank to charge compound interest at the prevailing rate. The Defendants' loan was, Mr Henson stated what is termed "principal and interest reducing loan". This is the normal form of mortgage-secured loan.

[25] Mr Henson next referred to paragraph 19 of the mortgage which he stated specifically authorised the bank to debit and charge "such fees as are charged or incurred by the bank from time to time during the continuance of this security .... also all costs charges and expenses (including legal costs charges and expenses between solicitor and own client ....)". According to Mr Henson the fees currently charged by the bank include Loan Administration Charge fees, late payment fees, legal fees and valuation fees.

[26] Mr Henson was referred to Document 3 page 49. This he stated, was the notice issued to the Defendants pursuant to section 109 of the Land Act. It shows the sum then owed by the Defendants to be $379,202.94.

[27] Finally, Mr Henson was referred to Document 23. This shows that on 16 March 2016 the Defendants owed the bank $403,907.30 exclusive of interest. Accrued interest amounts to $133,900.80 (Document 24). The total sum owed by the Defendants to the bank is therefore $537,808.10.

SUBMISSIONS

[28] On 14 March Mr Niu presented written closing submissions. Paragraphs 1-7 on pages 1 & 2, an application to amend sums

appearing in the Counterclaim to reflect the evidence given, were not objected to. Paragraph 8 (d), a claim for the proceeds of sale of the house ($180,000 – Mr Henson's brief paragraph 43) was described as being unnecessary and, on the undertaking of Mrs Stephenson that the sale price realised will be credited to the Defendant's account I declined to allow the further amendment.

[29] Mr Niu submitted that the Plaintiff bank had "failed to prove" that it had lawful authority to charge the fees complained of or to demonstrate "clear, express or even implied provisions" authorising compound interest to be charged. He referred to the mortgage document and suggested that on its true construction the mortgage deed did not permit the bank to levy the charges complained of. He further submitted that in the absence of a specific provision in the mortgage, compound interest should not have been charged. Mr Niu suggested that the notice issued by the bank to the Plaintiffs (Document 3-49) was not in the form required by the Land Act (in particular by not stating that the sum claimed was "the sum secured") and was accordingly not a section 109 notice. He rejected the proposition that paragraph 17 of the mortgage document had the effect of preventing an enquiry into the legality of some of the bank's debits brought into account in calculating the sum claimed.

[30] Mr Niu's answer to the suggestion that the Judgment of the Court of Appeal was a bar to the Counterclaim is set out in paragraphs 23 to 30 of his submissions. It appears to be predicated on the claim that the bank charges were unlawful. Finally, Mr Niu suggested that the bank had undersold the Defendants' house after taking possession.

[31] Mrs Stephenson filed helpful written submissions in answer. She submitted that the Defendants had not discharged the burden upon them to show that the charges complained of were not permitted by the mortgage contract between themselves and the bank. She referred to the several relevant sections of the mortgage upon which Mr Henson had commented.

[32] Mrs Stephenson suggested that having failed to show that the bank had unlawfully inflated the amount due under the mortgage, the basis for the claim for damages lacked any foundation. Secondly, referring to what the Court of Appeal had said in paragraph 10 of its judgment (quoted in paragraph 13 above), she submitted that it was the default of the Defendants, not the Plaintiff bank, that had led to foreclosure. In the premises the Defendants' claim was unsustainable. Finally, referring to the consent order for the sale of the Defendants' house (paragraph 9 above) she submitted that no claim for the loss of the house could possibly arise. As already noted, she advised the Court that the proceeds of the sale of the house would be credited to the Defendants' account.

CONSIDERATION OF THE ISSUES

[33] In my view there is no merit in the Counterclaim. I agree with Mrs Stephenson and Mr Niu in oral argument conceded, that in paragraph 2 on page 2 of his written submissions he had reversed the onus of proof. But even allowing that when the construction of a document is involved the onus may be of less importance than when the issues are factual, I am satisfied that the Plaintiff's evidence fell far short of demonstrating breach of contract by the bank.

[34] While Mr Henson was obviously not an independent expert witness, it cannot be disputed that he has considerable experience and knowledge of bank lending practices and procedures. His evidence which referred, as has been seen, to the specific provisions of the relevant contractual documents, was not challenged at all. On the other hand the First Defendant, whose evidence was not at all easy to follow, seemed to base his assertions on mere belief in what the bank was or was not entitled to do, without any reference to documentary support.

[35] It is not enough, for example, simply to state that compound interest is not permitted without clearly stating why. The relevant paragraph of the mortgage document is 1(g). This paragraph permits interest to be charged "at the prevalent rate", to be accrued and, at the end of every month "to be debited to the account of the mortgagor". In my opinion the documents produced by the bank taken together with Mr Henson's evidence plainly establish the bank's right to levy the various charges complained of.

[36] Mr Niu's suggestion that the June 2013 notice (Document 3-49) did not constitute a valid notice issued pursuant to paragraph 17 of the mortgage seemed to be slightly specious: since the notice clearly relates to the mortgage, the sum owed is the sum secured. As to paragraph 21 of his submissions, Mrs Stephenson accepted that a court was not prevented from enquiring into the justification for the charges or, if mathematical mistakes seemed to have occurred, to order an audit. In the present case the Court has in fact been enquiring into the lawfulness of the charges while the only calculation mistakes that emerged were those of the Defendants.

[37] In paragraphs 23 of his submissions headed "Court of Appeal (and Land Court) decision respected and accepted" Mr Niu appeared to be suggesting that while the Judgment of the Court of Appeal should be accepted it could also be avoided or disregarded because the Court was not aware that the Defendants wanted to claim that the bank had wrongly calculated the amount owed. In my view however, in the circumstances of this case, the precise amount owed is a question quite separate from the bank's right to foreclose. While the trial of the Defendants' Counterclaim might possibly have reduced the Defendants' indebtedness it could not possibly reopen for consideration the Defendants' decision not to continue making mortgage repayments which the Court of Appeal has already held to be unjustified.

[38] As to the value of the Defendants' house (paragraph 31 of Mr Niu's submissions) I accept Mr Henson's evidence that $180,000 was the best offer received.

RESULT: The Counterclaim is dismissed with Plaintiff's costs to be taxed if not agreed.

FAKAMAAU'ANGA FONUA
TONGA

M. D. Scott

DATED : 6 MAY 2016 **J U D G E**