IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 14 of 2013

BETWEEN : WESTPAC BANK OF TONGA - *Plaintiff*

AND : 1. SIOSAIA H. FONUA
2. MARY PREM FONUA - *Defendants*

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

DECISION

[1] The Plaintiff (the bank) is a bank carrying on business in Tonga.

[2] The Defendants are the joint registered lessees of lease number 4837. They are also the owners of a dwelling house built on the land.

[3] On about 9 March 2007 the Defendants mortgaged the land and dwelling house to the bank in consideration of advances to them amounting to $326,234.

[4] The Defendants fell into arrears, then resumed payments for a time before ceasing repayments altogether in November 2011. At this date according to Exhibit E to a supporting affidavit filed by Sioeli Nu'uhiva, bank officer, the sum owed was $323,485.42. According to a second supporting affidavit filed by Daniel Henson, bank officer, on 23 July 2013, the date the writ was issued the sum owed was $352,603. According to paragraph 18 of the Nu'uhiva affidavit the loan arrears at the same date stood at $71,739.90.

[5] The bank claims that by failing to make repayments as agreed the Defendants have breached section 109 of the Land Act. This section provides as follows:

> "In the event of the mortgagee taking possession of the lands mortgaged following default by the mortgagor of any of the obligations to the mortgagee set out in the mortgage deed or in any other document lodged with the Minister in terms of the next succeeding section the mortgagee shall give notification both to the mortgagor and the Minister of his intention to take possession of the lands mortgaged and may thereafter take possession at any time after the expiry of 14 days from the date of said notification".

[6] Section 110 reads as follows:

> "Except a provided by this as any other Act a mortgage deed (or any agreement or bond relating thereto) is effective according to its terms between the parties to it".

It was not submitted by Counsel that any exception to the section applied in this case.

[7] In February 2012 the bank demanded payment of arrears which then stood at $7,016.00. (Exhibit G to the Nu'uhiva affidavit) On 23 April repayment of the whole sum owed, said to be $339,618, was demanded. In October 2012 demand was again made, this time for arrears which were said to stand at $34,216. On 23 May 2013 the bank demanded repayment both of the arrears, then stated to stand at $61,416 and the whole sum advanced and owed to the bank amounting to $379,202.94. Notice was given that failure to comply with these demands would result in a section 109 notice being issued.

[8] No payment was made by the Defendants in response to the demands and on 13 June 2013 a section 109 notice was issued (Exhibit A). The Defendants have not vacated the land. This is an application for summary judgment filed on 10 February 2014 pursuant to RSC. O.15 as applied by O.2 r.2 of the Land Court

Rules. The Plaintiff seeks (a) a declaration that it is entitled to possession of the leased land following issuance of the S109 notice and (b) an order for possession of the land. Also included in the application is the dwellinghouse erected on the land.

[9] When the application first came on for hearing on 17 April 2014 Mr Niu suggested that the summary judgment procedure was either unavailable or unsuitable for the disposal of issues in the Land Court. I disagree. The procedure (unlike judgment in default of defence) is not excluded by the Rules and I can see no advantage in requiring a plaintiff faced with an obviously unarguable defence to go to trial. As is well understood summary judgment should only be granted in the clearest cases and when there are no arguable issues of fact. Since Mr Niu had filed no evidence and suggested that the evidence filed by the Plaintiff was disputed he was given leave to file affidavits in answer. The application was then adjourned for continuation in the presence of an assessor.

[10] On 27 June the Defendants filed the first of two affidavits. As may be seen from the first affidavit and the amended statement of defence filed on the same day the Defendants do not dispute the accuracy of the Plaintiffs' calculations and that they owe the bank at least $201,147.22 nor that they are in arrears with their repayments.

[11] The Defendants say that the total sum claimed by the bank includes various sums wrongly taken into account and which should be deducted from the debt. They say that these sums were unlawfully debited to their account and this unlawful debiting justified their decision to stop making their monthly repayments. In paragraph 3 of the first affidavit the Defendants propose that the $201,147.22 conceded to be owed be repaid by them over a three year period free of interest.

[12] This is not the first time that the Defendants have proposed that interest be waived or that other repayment terms be waived. In paragraphs 5 to 10 of their second affidavit filed on 18 February 2015 they explain that after experiencing difficulty adhering to the terms agreed they had approached the bank asking for some or

all of the interest on the loan to be waived. The bank however refused: "We stopped payment because despite our requests to waive interests or part of the interests of our loan, the bank refused to do so or to talk with us about it".

[13] In paragraphs 10 and 11 of the same affidavit the Defendants explain that had the bank accepted their proposal to waive interest resulting, they suggest, in a reduction of the loan "from $350,000 or so to $200,000 we would have gladly continued to pay the monthly payments and our loan would have been manageably reduced".

[14] Unfortunately, the terms of contracts in general and mortgages in particular cannot be altered unilaterally. I am satisfied that the bank's refusal to accept the Defendants' proposal for variation cannot afford them any justification for ceasing repayments.

[15] The second ground advanced as excusing repayments was the alleged unlawful charges, particulars of which are set out in paragraph 2 (a) – (d) of the Defendants' first affidavit. These are said to be:

(a) Loan administration charges : $32,000
(b) Late payment fees : $4667.50
(c) Interest upon interest : $81,027.34
(d) Legal fees : $31711.62

[16] Mrs Stephenson addressed these matters in paragraphs, G and H of her written submissions. She referred to clause 1(g) of the mortgage deed and suggested that all the charges debited to the Defendants' account could be justified by the agreement reached. As I find, it is not necessary to decide this issue at this stage. Neither it is necessary to examine the effect of the Defendants' agreement recorded on 21 October 2009 and referred to in paragraph 17 of the submission.

[17] In his own submissions filed on 19 February 2015 Mr Niu summarized the main principles governing summary judgment. He restricted himself however to the grant or refusal of *unconditional* leave to defend and did not address the Court's power to grant *conditional* leave to defend *all or part* of a claim.

[18] In paragraph 13 of her submissions Mrs Stephenson emphasized that the bank was not in this application (or indeed in the action itself) making a claim for money owed to it by the Defendants. Rather, it was seeking an interlocutory declaration as to proprietary rights, in this case the right to invoke section 109, following breach.

[19] In preliminary discussion both Counsel agreed that it is not every default, however technical or minor, which would justify a section 109 notice being issued. Although the wording of the section suggests that it operates automatically, it was accepted that the court has power, at the instance of either party, to rule whether or not a default has in fact occurred and, if so, whether it may be remedied or relieved.

[20] I rather doubt that all the charges complained of by the Defendants can be answered by reference to the mortgage deed but suspect that some will be supported by the terms of the overall contractual relationship between the parties. Whether, however, this is or is not the case, I am satisfied that the imposition of charges thought by the Defendants to be unlawful did not entitle them to cease paying the amount which they concede was lawfully due.

[21] In my opinion the conduct of the Defendants clearly amounted to serious default and the Plaintiff was entitled to issue the section 109 notice and, if not complied with, to have it enforced.

[22] Because of the prevailing view that buildings are not part of the land (*Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] To. L.R.183) the notice cannot apply to the dwellinghouse. Whether however it would be practical to retain possession of the house if access across the land surrounding it is denied, I do not know.

[23] The granting of the declaration sought does not, of course, prevent the Defendants from challenging the validity of the Plaintiff's claim to the disputed element of the sum claimed. But that challenge would have to be in the Supreme Court, as would

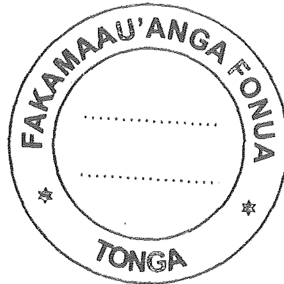
any claim by the bank in respect of the dwellinghouse.

Result:

(i) It is declared that the Plaintiff is entitled to possession of lease 4837;

(ii) Defendants are to give vacant possession of the land comprised in the lease in 28 days.

(iii) Defendants to pay the Plaintiff's costs of this application, to be taxed, if not agreed.



M. D. Scott
JUDGE

DATED: 6 March 2015.

M. Taufa
27/2/2015