Solicitor General

28/10/16

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IN THE SUPREME COURT OF TONGA CV 204 of 2008
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

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

\- **Plaintiff (Respondent)**

AND : **1. DANDIN GROUP [TONGA] LIMITED**
2. LISIATE TEULILO

\- **Defendants (Applicants)**

Mrs P. Tupou for the Respondent
Second Applicant in person

DECISION

[1] In December 2008 the Plaintiff commenced proceedings seeking $192,727.24 plus interest. The amount was claimed following failure to repay a loan. The loan was secured by a mortgage over the Second Defendant's town allotment.

[2] In an Amended Statement of Defence filed in March 2013 the Defendants advanced several principal grounds of defence. They pleaded that the loan calculations were incorrect, that the repayment schedule was unreasonable and that the interest charged was excessive. They also claimed that the Plaintiff knew

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perfectly well that the Defendants would not be able to repay at the rate required and that the Plaintiff had acted unconscionably. In the premises, any claimed arrears arose "directly or otherwise by the [Plaintiff's] own action".

[3] The Counterclaim is not relevant to this application.

[4] The trial took place in July 2015 and on 7 August 2015 judgment in the amount claimed was awarded to the Plaintiff. The defence claims based on unconscionability, liability and quantum were rejected.

[5] An appeal to the Court of Appeal was dismissed on 8 April 2016.

[6] On 25 July 2016 a notice to quit was served on the Second Defendant pursuant to section 109 of the Land Act (Cap 132) relying on the judgment of the Supreme Court. The sum stated to be owed by the Defendants at the date of the notice had risen to $183,434.74. It is not disputed that no part of this sum has been repaid to the Plaintiff.

[7] On 11 August 2016 the Second Defendant filed a document addressed to the Lord Chief Justice headed "Apply for leave on notice served pursuant to section 109 of the Land Act (Cap 132) from ANZ Bank Ltd".

[8] As explained in the document, the Second Defendant, who is not legally qualified or represented, sought a stay of execution of the section 109 notice on several grounds:- first, his physical and mental condition, secondly to allow him to repay the debt by installments and thirdly to allow him time to find employment.

[9] A fourth ground was that the Plaintiff "has committed fraudulent and perjury on the registration of the mortgage on my deed".

[10] On 25 August 2016 the Second Defendant filed a further "Application for leave for interim reliefs". This application refers to the following provisions:

(i) Constitution of Tonga, Clause 14;

(ii) Universal Declaration of Human Rights, Art. 10; and

(iii) Supreme Court Rules Orders 7 (2)(e) and (3).

[11] In a supporting affidavit the Second Defendant did not refer to or repeat the grounds set out in support of his 11 August application, rather, he suggested that the Plaintiff had not complied with section 103(2) of the Land Act and had, apparently, tried to conceal this failure by the creation of false documents.

[12] In support of these allegations the Second Defendant referred to an ANZ diary note P-17 attached to the affidavit and also to a photograph of part of the mortgage deed relied on by the Plaintiff P-19. The Second Defendant also told me that he had obtained certain information from a Mr Mafi who had signed the deed on behalf of the Minister. The Second Defendant had twice reported the matter to the police but had made no progress with his complaint: he alleged that this was as a result of interference by the Registrar of the Supreme Court who had a family interest in the matter.

[13] The combined application was heard on 20 September. After going through the papers with the Second Defendant he agreed that the essence of his claim was that there was no valid

mortgage agreement between the parties and therefore no ground to issue a section 109 notice. The reason there was no valid mortgage was that apparently the mortgage had not been registered within 30 days of its execution as required by section 103 of the Land Act. The Second Defendant argued that unless a stay were granted his property would be "taken away except according to law" (Clause 14) and "without a fair and public hearing" (into his allegations of fraud and perjury) (Article 10).

[14] In answer, Mrs Tupou accepted that it might well be the case that the mortgage which, accounting to document P-11 annexed to the Second Defendant's affidavit, appeared to have been registered on 27 September 2005, may have been executed more than 30 days before this date. The section 103(2) requirement however was not that a mortgage be *registered* within 30 days of execution but that it be *delivered* to the Ministry within that period after final signature. In any event, the section is directory, not mandatory, unlike subsection (4). Any suggestion that the mortgage was not properly registered was unsupported by any credible evidence or a proper interpretation of the documents. In conclusion, Mrs Tupou pointed out that no proceedings had been commenced by the Defendants against the Ministry of Lands.

[15] Although not raised by the parties, I accept, for the purposes of this application that the Supreme Court, having previously dealt with the contractual relationship between the parties, has jurisdiction to entertain an application to stay a section 109 notice arising from an established breach of that relationship (see *Fonua v Westpac Bank of Tonga* [2015] To. LR 410).

[16] Secondly, although the Land Act does not provide any mechanism for applying for such a stay, I am satisfied that the Supreme

Court has the inherent power to stay such a notice if satisfied that it has been issued unlawfully. The only question therefore is whether, in the circumstances of this case, a stay should be ordered.

[17] In my opinion the Second Defendant's application faces several major difficulties. As a general principle, it is an abuse of the process of the Court to attempt to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings (*Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd* [1975] AC 581).

[18] As is made clear from the first line of the submissions filed in support of the appeal (AC 23/15 filed 30-3-16) "this case is about a loan agreement between the Appellants and the Respondent". Security for the loan included the mortgage in question. A copy of the mortgage was included in the submissions filed. The sections of the Land Act were stated in paragraph 29 of the submissions to be sections 97, 98, 100, 102 and 104. Plainly section 103 had been considered but found to be irrelevant. I can find no good reason for raising the relevance of section 103 for the first time after disposal of the appeal.

[19] Secondly, page 25 of the Plaintiff's production of documents (a letter of offer dated 10 April 2007) states, at paragraph 6:

> "the following securities are held by the bank:
>
> - First Registered Mortgage over town allotment of Lisiate Teulilo situated at Tofoa, Tongatapu including all improvements thereon".

The validity of this security was not raised by the Defendants at the trial.

[20] Thirdly, as may be seen from pages 64 – 70 of the Plaintiff's production of documents, several formal demands were made for the repayment of the loan which led to discussions between the parties and attempts to avoid legal proceedings for recovery. On 21 November the Second Defendant acknowledged, understood and accepted a variation to the "current arrangements" which included an obligation by the Defendants to repay a debt of TOP$192,727.24. On 5 December the Second Defendant wrote to the Plaintiff: "I still intend to make up the arrears" and "I will keep on fighting to pay up my due". In my view these statements amount to an acknowledgement of secured indebtedness.

[21] Next, the diary note P-17 upon which the Defendants rely was included by them at page 100 of their production of documents at the trial. It will be seen that the diary note, first paragraph, reads as follows:

> "Customer is aware that we are proceeding with action and that matter is with our solicitors. The process explained and indicated that he has time before he go to a mortgage sale and at any time up to an actual sale he can clear the debt ...."

The Defendants have not challenged the accuracy of this diary note.

[22] The Second Defendant emphasised the second bullet-point passage at the foot of the page:

". Check the security title details as now not yet recorded in the register, ANZ register from the L & S differs and incomplete to that in the valuation. Confirm we have registered mortgage from back of title".

He forcefully suggested that this showed that the mortgage had not been registered. I disagree. In my opinion this entry, upon which the Defendants had ample opportunity to cross examine at the trial, merely suggests double checking by the Plaintiff to ensure that its security was sound before legal proceedings were launched.

[23] The second document relied on by the Second Defendant P-19 was also included in the Defendants' production of documents at page 131. It was not suggested at the trial that this document revealed anything improper or illegal to have occurred. In particular no breach of section 103 of the Land Act is disclosed. Mrs Tupou's analysis of the requirements of the section is clearly correct. Furthermore, the mortgage deed dated 4 March 2005 appears, beyond all doubt, to have been signed by the Second Defendant on 12 August 2005 (exhibit to second Appellants' submissions filed on 30 March 2016).

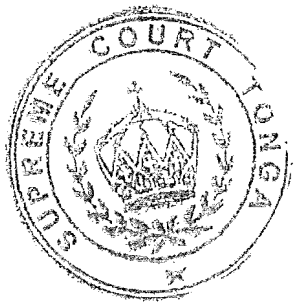
[24] In my opinion the facts and matters now raised by the Defendants were all available to be raised at the trial and should have been raised at the time.

[25] With respect, neither Clause 14 of the Constitution nor Article 10 of the Universal Declaration of Human rights can avail the applicants. The enforcement now being sought by the Plaintiff follows exhaustive examination of the circumstances leading to the issuance of the Section 109 notice both in the trial court and

in the Court of Appeal. Order 7 of the Supreme Court Rules is merely procedural and does not provide relief in itself.

[26] While I have sympathy for the very difficult situation in which the Second Defendant finds himself I find no arguable basis for interfering with the execution of the section 109 notice.

DATED: 14 October 2016



M. D. Scott
J U D G E