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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 53 of 2016**

BETWEEN: **BANK OF SOUTH PACIFIC TONGA LTD**

Plaintiff

AND: **SIOSAIA H. FONUA**

First Defendant

MARY PREM FONUA

Second Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Counsel: **Mrs. D. Stephenson for plaintiff**
Mr. L. Niu SC for defendants

Hearing: **27 January 2017**
Date of Ruling: **14 February 2017**

RULING

The application

[1] The plaintiff is a bank. It seeks summary judgment against the defendants for the balance of advances made to them. The defendants oppose summary judgment arguing that they have counterclaims against the bank that ought to be heard.

Recd 14/02/17

The rules and the principles

[2] Applications for summary judgment are made on notice. It is a requirement of O.15 Rule 3 Supreme Court Rules that the plaintiff is to file an application and supporting affidavit.

[3] Under O.15 Rule 5(1) a defendant may oppose an application for summary judgment by affidavit or by leave of the Court in some other manner. O.15 Rule 5(2) provides that:

> A defendant's affidavit must state clearly what the defence is, and what facts are relied upon to support it.

[4] Relevant also in the present case, O.15 Rule 7 provides that where the Court enters summary judgment on a plaintiff's claim it may stay execution of that judgment pending determination of any counterclaim advanced by the defendant.

[5] The guiding principles of summary judgment have been set out in decisions of this Court and the Court of Appeal (*Westpac Bank of Tonga v Toloke* [2015] Tonga LR 367, *Australia & New Zealand Banking Group Ltd v Toloke* (Unreported, Land Court, LA 13 of 2015, 4 February 2016, Paulsen LCJ) approved in *Toloke v Australia & New Zealand Banking Group Ltd* (Unreported, Court of Appeal, AC 2 of 2016, 14 September 2016)).

[6] It will suffice for present purposes to repeat what the Court of Appeal said in *Moehau v Westpac Bank of Tonga* [2013] Tonga LR 71 at [17] as follows:

> Notwithstanding the plethora of authorities on the point placed before the Court by counsel for the appellants, there can really be no dispute about what a plaintiff applying for summary judgment must demonstrate. Under Order 15 rule 2 and comparable rules in other jurisdictions a defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail. The Supreme Court must be satisfied, in other words, that the asserted defence has no prospect of succeeding at trial. In a case in which there is a factual contest it may not be proper to enter summary judgment and deprive the defendant of the exercise of the right to a trial. But merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statements by the same deponent or inherently improbable in itself it may be": *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.

The course of this application

[7] The plaintiff's application was filed on 16 November 2016. At a timetabling conference of 29 November 2016 I ordered that the plaintiff was to file an amended statement claim by 13 December 2016, the defendants had until 10 January 2017 to file any opposition and affidavits and that the application would be heard on 27 January 2017.

[8] The plaintiff's amended claim was filed on 12 December 2016. It was not until 25 January 2017 (two days before the hearing) that the defendants filed an amended statement of defence and counterclaim along with a curt affidavit.

[9] The defendants' amended statement of defence admits all elements of the plaintiff's claim except that the amount claimed is owing. It does however plead various counterclaims seeking damages.

[10] The defendants' affidavit does not provide any evidential foundation for the counterclaims. It does not confirm the contents of the amended statement of defense and counterclaim. The defendants baldly state that they believe their 'defences and counterclaims are strong and proper'.

[11] Although the defendants' amended statement of defence and counterclaim and their affidavit were filed very late Mrs. Stephenson elected to proceed with the hearing on 27 January 2017 and spoke to the matters that had been raised.

[12] Mr. Niu spoke to the defendants' counterclaims but was unable to provide any case authorities to support what were, to my mind, propositions of law that are contrary to established principles and in some respects, heterodox. Mr. Niu advised me that he had supporting decisions but he had difficulty printing them. I gave him until 2 February 2017 to provide those decisions and submissions as to their relevance.

[13] On 2 February 2017, Mr. Niu filed two decisions of the Supreme Court of Victoria along with further submissions. The submissions went considerably further than I had allowed. They included new arguments along with additional allegations of fact unsupported by any evidence. Mrs. Stephenson filed submissions in reply on 8 February 2017.

The facts

[14] The plaintiff is a bank and carries on business in Tonga. It was formally known as Westpac Bank of Tonga.

[15] The defendants are a married couple. They have obtained loans from the plaintiff for private and business purposes.

[16] On 19 August 2005, the plaintiff made a loan to the defendants, on the terms set out in the amended statement of claim, in the amount of $260,650. This amount included a prior advance which had been used to refinance the defendants' home from ANZ to the plaintiff. The plaintiff subsequently agreed to requests from the defendants to provide additional advances. The advances were obtained for business purposes. By July 2006 the amount advanced had increased to $326,234.

[17] The defendants defaulted on their payments. By 31 October 2011 they had ceased making payments altogether. The plaintiff made a number of demands for payment of the amount outstanding during May 2013 but was not paid.

[18] In April 2016, the plaintiff exercised its power of sale over the defendants' leasehold land at Fangaloto which had been provided as

security for the plaintiff's advances. The sale proceeds were credited to the defendants' debt and a further amount of $7,900 credited to them in September 2016. The balance owing was then $371,629.21, which the defendants have failed to pay.

[19] All of the above is admitted by the defendants. However the defendants deny that they are liable to make payment of the $371,639.21.

Resolution of the application

[20] I am satisfied by the evidence and the admissions of the defendants that the plaintiff has met the onus upon it to satisfy the Court that it is entitled to summary judgment. As Mrs. Stephenson correctly pointed out, there is no meaningful evidence from the defendants to challenge the plaintiff's case. The allegations of fact in the statement of defence are not evidence. The allegations of fact in Mr. Niu's submissions are not evidence. That is enough to dispose of this matter. However, in deference to the defendants I am going to address the matters that have been raised as counterclaims and explain why none, in my view, are arguable.

The counterclaims

[21] The defendants allege that the plaintiff owed them duties of care to ensure that they had the means to repay the loans, to appraise the security offered to ensure that it was adequate and to refer them for independent advice. In his written submissions Mr. Niu supported the

imposition of such duties on three grounds. I will deal with each in turn.

[22] First, Mr. Niu argued that the duties are justified on the 'neighbour' test in *Donoghue v Stevenson* [1932] AC 562, 580 and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027. They are important decisions and have been applied to determine whether a duty of care exists in a great variety of cases. However, the existence (and ambit) or otherwise of a relevant duty of care is usually well established and not a live issue. Such is the case here. It is settled law that in the absence of special circumstances the relationship between a bank and its customer is one of debtor and creditor. The relationship does not give rise to a duty of care on the part of the bank to advise the customer of the prudence of a loan or the wisdom of the customer's intention to borrow or to be satisfied as to the adequacy of any security offered. In a typical relationship of debtor and creditor each party is entitled to look out for its own interests and is entitled to expect that the other party will do the same. (*Dandin Group (Tonga) Limited & Teulilo v ANZ* (Unreported, Court of Appeal, 8 April 2016, AC 23 of 2015), *Westpac Bank of Tonga v Toloke* [2015] Tonga LR 367, *Southland Building Society v Alison* [2012] NZHC 2614 and *Baldwin v Daubney* (2005) 78 O.R (3d) 693)).

[23] In *Lloyds Bank plc v Cobb* (UK Court of Appeal, 18 April 1991) cited in *Tyrees Banking Law in New Zealand* at 4.8 page 132 Scott LJ said:

> In my judgment, the ordinary relationship of bankers and customers does not place on the bank any contractual or tortious duty to advise the customers on the wisdom of commercial projects

> for the purpose of which the bank has been asked to lend money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, or some arrangement between the customer and the bank under which the advice is given.

[24] There is nothing to suggest that there was a special relationship between the plaintiff and the defendants or that the plaintiff provided advice to the defendants as to the prudence of their borrowing from which the existence of a duty of care might be inferred.

[25] Secondly, Mr. Niu argued that the plaintiff was bound by the Code of Banking Practice of the Australian Bankers Association. The Code provides at clause 25.1 that before offering or extending credit the bank will exercise the care and skill of a diligent and prudent banker in selecting and applying credit assessment methods and forming an opinion as to the customer's ability to repay advances. Mr. Niu submitted that the Code reflects desirable and proper banking practice which applied to the plaintiff because Westpac Banking Corporation of Australia was bound by the Code and the plaintiff was a subsidiary of that bank.

[26] The Code has no application in Tonga. It is apparently a voluntary code adopted by some Australian banks. The plaintiff is not an Australian bank and did not adopt the Code. Furthermore, the plaintiff never held itself out as bound by the Code nor did the defendants plead that they relied upon, or even knew of the existence of, the Code when they obtained their advances. For this reason the two cases that Mr. Niu provided with his written submissions were not helpful.

[27] Thirdly, Mr. Niu argued that if this Court was to find that the Code does not apply in Tonga it should hold that it has been adopted here because of the legislative history of Tonga, particularly the Contract Act (Cap 25). Under the Contract Act agreements for goods to be supplied, services to be rendered or money lent where the consideration exceeded $500 could not be enforced unless registered. The Act provided that a Magistrate might refuse to register such an agreement if it appeared to him that the agreement was 'beyond the power of either party to perform' (sections 5 and 10 of the Act).

[28] The Contract Act was repealed in 1989 from which time it ceased to be part of the corpus of Tongan law. It is not a proper basis to infer the existence of a duty of care in tort. If it were otherwise such a duty must necessarily extend not only to banks but to any supplier of goods and services. Should a plumber, electrician, retailer or lawyer be precluded from recovering a debt for goods and services supplied because he failed to assess his customer's creditworthiness? That would have a most chilling effect on commerce in the Kingdom.

[29] Importantly, there is no evidence whatsoever that the practices in the Code have been accepted here in Tonga or that any of the duties for which the defendants contend have been recognised in Tonga as a matter of banking practice.

[30] Even had I been of the view that it was arguable that the plaintiff owed the defendants a duty of care I would have found that it had not been breached. The plaintiff assessed the defendants' creditworthiness and the defendants are people well capable of looking after their own interests. Furthermore, any failings in the plaintiff's assessment of the

defendants did not cause them any loss. The defendants' defaults were apparently caused by circumstances quite beyond the reasonable foresight of the parties, including the riots and what Mr. Nui described as the "high incidents of thefts embezzlements, burglaries and robberies in Tonga".

[31] In so far as the defendants say that they should have been referred for independent advice before taking out the loans, the law does not oblige that of the plaintiff in a case such as this. In any event the plaintiff's letters of offer contain an acknowledgement that the defendants were offered the opportunity to seek advice. There is also a warning that the defendants should not sign for the loans unless they had read and understood the terms.

[32] The next matter raised by the defendants relates to a quite separate loan advance made by the plaintiff to the second defendant in 2006 or 2007 for $600,000 to purchase a lease and buildings. It is pleaded that in making the advance the plaintiff had a conflict of interest as it was the mortgagee of the property that the second defendant was acquiring, its customer was in default and the plaintiff had an interest to "sell the mortgaged property for as much as it could get". It is alleged that $200,000 of the loan was advanced to a third party so that the buildings were not renovated and rented out as expected. It is also alleged that the loan should not have been made without the first defendant's consent after being given independent legal advice.

[33] A duty not to act in a position of conflict is recognised by equity where the relationship between the parties is a fiduciary one. As a general rule a bank is not a fiduciary for its customer. As the Court of Appeal

noted in *Dandin Group (Tonga) Limited & Teulilo v ANZ* (Unreported, Court of Appeal, 8 April 2016, AC 23 of 2015):

> In general a Bank does not owe a fiduciary duty to its customers. The existence of a special fiduciary duty must be based on unusual facts which must be proved.

[34] The core banking activities of receiving deposits and making loans are not fiduciary in character because in the absence of special circumstances there is no legitimate expectation that the bank will not utilise its position in a manner which is adverse to the customer (*Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 (PC)). In this case the plaintiff did not undertake (expressly or by implication) to act on behalf of the defendants in circumstances which gave rise to an obligation of loyalty.

[35] In any event, any claim the second defendant might have had arising from the circumstances under which this advance was made was fully settled by a deed of settlement she entered into with the plaintiff on 10 May 2010 (exhibit L to the first affidavit of Daniel Henson). In his written submissions Mr. Niu challenged the settlement agreement on the basis that the plaintiff had not given consideration for it and that it was a fraudulent agreement. There was clearly consideration for the settlement agreement in that the plaintiff accepted a reduced sum in satisfaction of the second defendant's indebtedness. There is absolutely no evidence of fraud and, consistent with Counsel's obligations, that submission should never have been made.

[36] As far as the first defendant is concerned it would be wholly unrealistic for him to assert he was not fully aware that the loan was made to the second defendant and, in any event, the plaintiff had no obligation to obtain his consent. The existence of such a duty (for which I know of no authority) would not only impose an unreasonable burden upon the plaintiff but would also be an unjustifiable restriction on the activities of the second defendant.

[37] There are two further arguments advanced by the defendants. First they plead that the plaintiff breached a duty of care in not providing in the loan agreements whether interest was simple interest or compound interest. Secondly they argue that the plaintiff failed to obtain the best possible price for the Fangaloto property. Both of these matters have both been determined in other proceedings between these same parties (*Fonua v Westpac Bank of Tonga* (Unreported, Court of Appeal, AC 5 of 2016, 14 December 2016). The defendants cannot raise them again.

Result

[38] The plaintiff is entitled to summary judgment.

[39] Judgment is entered in favour of the plaintiff and against both defendants in the sum of $371,639.21.

[40] Interest is awarded on the sum of $371,639.21 from the date of judgment until payment at the rate of 10% per annum.

[41] The plaintiff is entitled to costs to be fixed by the Registrar if not agreed.

[42] The defendants' counterclaims are without merit and I do not see any basis to order a stay of the plaintiff's judgment.

[43] Mrs. Stephenson has indicated that the plaintiff will apply to strike out the defendants' counterclaims. Whether the plaintiff pursues that particular course or not, a statement of defence to the counterclaims should be filed within 28 days.

O.G. Paulsen

NUKU'ALOFA: 14 February 2017 **LORD CHIEF JUSTICE**