Solicitor General

Scan, email, upload & file

27/01/20.

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 4 of 2019**

BETWEEN:

LUNA'EVA ENTERPRISES LTD Plaintiff

-and-

MOSESE SENITULI MANU Defendant

JUDGMENT IN DEFAULT OF DEFENCE

APPLICATION FOR INTEREST UP TO JUDGMENT, GENERAL DAMAGES AND COSTS

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr H. Tatila for the Plaintiff/Applicant
Date of hearing: 22 January 2020
Date of ruling: 22 January 2020

Introduction

1. The case raises issues in relation to the court's power to award interest from the date on which a cause of action accrues to the date of judgment ("pre-judgment interest") and claims for general damages for distress and inconvenience in contract.

Background

2. Between 19 October 2015 and 23 December 2015, at the Defendant's request, the Plaintiff loaned the Defendant various sums totaling $27,816.88. The loan agreement was oral. There were no terms agreed between the parties as to any interest to be paid on the borrowings or a date for repayment.

3. Between January 2016 and January 2019, the Plaintiff demanded repayment of the loan monies. The Defendant failed and/or refused to pay.

24 JAN 2020

4. On 21 February 2019, the Plaintiff commenced these proceedings for recovery of the loan monies. In addition, the Plaintiff claimed interest at 10% per annum from 10 November 2015 and $2,000 for general damages.

5. As to that latter claim, paragraph 8 of the Statement of Claim contains the following allegation:

> *"The Plaintiff is suffering great damages for the wrongful actions of the Defendant as he executed his power as businessman in an oppressive, unconstitutional, arbitrary and unlawful manner thereby inflicted inconvenience, embarrassment and humiliation on the Plaintiff without due regard to justice and law."*

6. The Defendant was served with the originating proceedings on 12 July 2019.

7. The Defendant did not file a Statement of Defence within the time required by the Rules or at all.

Application for default judgment

8. On 7 November 2019, the Plaintiff applied for judgment in default of defence. The application sought the principal sum claimed plus 10% interest per annum from 10 November 2015 until settlement, general damages to be assessed by the court and costs.

9. On 11 November 2019, I granted judgment in favour of the Plaintiff against the Defendant in respect of the principal sum of $27,816.55. However, I directed that the Plaintiff file and serve:

   (a) submissions in support of its claim for interest at 10% per annum from 10 November 2015;

   (b) any affidavit/s and submissions in support of the claim for general damages; and

   (c) a bill of costs.

This application

10. The Plaintiff's claim for interest, general damages and costs was heard today.

11. The Defendant operates a business which exports Tongan food products to Australia. As the originating proceedings show, the Defendant also has an Australian address. Mr Tatila informed the court that he attended the Defendant's office in Mo'afunga on 14 December 2019 for the purpose of serving him with copies of the filed application documents. He said he was told by the Defendant's staff that the Defendant had left Tonga the night before.

12. Notwithstanding that the Defendant has not been served with the documents relevant to this part of the Plaintiff's application, I determined to continue to hear and consider the application. I did so because order 14 rule 1 entitles the Plaintiff to apply ex parte for final judgment in default of the Defendant filing a Statement of Defence within time. Order 14 does not contemplate the Defendant being heard on the application. This application only concerns certain of the terms of the default judgment. The Defendant may bring an application to set aside the default judgment: O.14 r. 4.

13. I considered the material filed by the Plaintiff in support of its applications. I heard from Mr Tatila in relation to a number of issues arising from that material and other more general questions about certain elements of the Plaintiff's claims. For the most part, Mr Tatila did not have any further oral submissions to make and was content for the court to decide the issues on the application.

14. At the conclusion of argument, I delivered my decision in court on each aspect of the application and said that I would provide more fulsome written reasons. These are those reasons.

15. Despite the simple nature and quantum of the claim, the issues which arose on this application turned out to be of some significance. Nothing within the Plaintiff's submissions, nor from my research, suggested that the issues considered below on pre-judgment interest and general damages for distress and inconvenience on contract claims have been addressed in any prior decisions of this court or the Court of Appeal. Accordingly, the reasons which follow may be of broader application for practitioners and parties in the Kingdom for future proceedings.

Interest up to judgment

16. In support of the application for interest, the Plaintiff relied on a memorandum by its counsel dated 6 December 2019. The majority of the submissions merely recite the key allegations from the Statement of Claim. However, at paragraph 10, Mr Tatila referred to the decision in *Allied Foods Company Limited v Moa* [2000] TLR as authority for the proposition that where a Plaintiff has been kept out of its money for a long time despite the clear liability of the Defendant to pay, interest may be ordered. The interest rate applied in that decision was 10% per annum from the date of consignment. The Plaintiff submitted that it too has been kept out of its money for a very long time despite the clear liability of the Defendant to pay.

17. A Plaintiff is generally not permitted to obtain default judgment for a liquidated amount which includes a claim for interest unless the originating process sets out how the interest is claimed and the amount of interest claimed in relation to a particular period: see, for example, *Pata Nominees Pty Ltd v Veldt Nominees Pty Ltd* (1992) 7 WAR 304. The alternative is for the plaintiff to obtain a final judgment for the liquidated amount (the principal claimed) and interlocutory judgment for the unliquidated amount (the interest to be assessed): see, for example, *Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd* [1981] 3 All ER 658. I have approached the present application on that basis.

18. The Plaintiff did not make any submissions in relation to the Court's power to award interest up to judgment, the legal basis for the Plaintiff's entitlement, or the appropriate rate of any such interest.

Power

19. In the absence of any contractual arrangement or a relevant statute, a debt does not carry interest: *Re Australian Metal Co Ltd* (1923) 33 CLR 329 ; *Robertson v National Insurance Co of New Zealand Ltd* [1958] SASR 143 ; *President of India v La Pintada Compania Navigacion SA* [1984] 2 All ER 773. Nevertheless, in equity, a court has power to award interest and to fix the rate at which it should be paid when justice demands it: *Thomas v SMP (Int'l) Pty Ltd (No 6)* [2010] NSWSC 1311.

20. Section 5 of the *Supreme Court Act* confers on the Supreme Court power, among other things, to make orders for interest 'on debts and other moneys payable for such period and at such rates as the court considers appropriate, in accordance with rules of the Supreme Court.' It is, self-evidently, a broad power. The discretion is to be exercised judicially. It must not be exercised arbitrarily, but in accordance with reason and justice,[1] and having regard to all relevant matters.[2]

21. Order 30 rule 2 provides for post-judgment interest in the following terms:

> ***Judgment debt to carry interest***
>
> *(1) Every judgment debt shall carry interest from the time of judgment being given until the judgment is satisfied.*
>
> *(2) Unless the Court specifies otherwise, the interest under paragraph (1) shall be at the rate of 10% per annum.*
>
> *(3) The interest may be levied under any execution order upon judgment. The Rules do provide whilst they do provide for interest following judgement, but not prior to it.*

22. However, the Supreme Court Rules are silent on pre-judgment interest.

23. Order 2 rule 3 provides that where there is no provision in the Rules, the rules of procedure under the former Rules of the Supreme Court (RSC) in England (the "White Book") shall continue to apply notwithstanding the substantial and ongoing replacement of those rules by the Civil Procedure Rules 1998 (CPR).

24. Further, order 2 rule 4 provides that if it appears in any given situation that no appropriate provision exists either in the Rules or the English Rules, then the procedure to be followed shall be that prescribed by the Judge and in doing so, the Judge may be guided by any provision in the English Civil Procedure Rules 1998 (CPR).

25. The White Book and the current UK Civil Procedure Rules[3] provide that a default judgment may include an amount of interest claimed to the date of judgment, provided it has been claimed at a rate no higher than the judgment debt rate and is

---

[1] *Taione v Pohiva* [2006] TOSC 23 citing *Ottway v Jones* [1955] 2 All ER 585.
[2] *Bennett v Aigner* [1991] TOCA 1.

[3] CPR 12.6

calculated pursuant to the relevant rule. For many years, that rate has been 8% per annum.[4]

26. The position in Australia is described in "Australian Civil Procedure" by Bernard Cairns[5] as follows:

> *"The rules permit interest to be included in a default judgement. This might appear to give the Plaintiff the right to interest in a default judgment irrespective of whether the agreement provided for interest. Despite the wording of the rules, interest is payable on a debt in either of two circumstances. Either interest is payable where the agreement between the parties provides for it, or, it is payable if there is a statutory right to interest in the nature of damages. Outside these cases interest cannot be included in a default judgement.*
>
> *For interest to be properly claimed as a liquidated amount there must be a contractual obligation to pay it:* Philips Industries Holdings v Debrueys *[1977] Qd R 193. Conversely, if interest is properly payable, it may be claimed as a liquidated amount, and as such it will support a default judgment. The rules do not confer a right to interest where it is otherwise not payable. Contrast this with the statutory right to interest in the nature of damages.*
>
> *There is a statutory basis for the Plaintiff to recover interest for the period between the date of the cause of action and the date of the judgment [various Australian State and Territory Acts referred to]. This is interest in the nature of damages. It is not liquidated because the court has to determine whether the Plaintiff is entitled to it and assess the amount payable:* Dalgety Futures Pty Ltd v Poretsky *[1980] 2 NSWLR 646. Since any entitlement to interest and the nature of damages is a statutory entitlement there is no need for an agreement to provide for it. Statutory interest is intended to compensate the Plaintiff for having to wait for money or for damages. It is payable on all money judgments for tort and contract alike, but only if the court orders interest."*

27. In the instant case, and despite there being no agreement for the payment of interest during the currency of the loan, in my view, the proper exercise of the power and discretion conferred by s.5 of the *Supreme Court Act* militates in favour of awarding the Plaintiff some interest between the date on which the

---

[4] *Senior Courts Act* 1981, s.35A; *Judgments Act* 1838 (as amended), s.17; White Book 2001 [12.6.2]; The Late Payment of Commercial Debts Regulations 2013.

[5] Seventh edition, Thomson Lawbook Company.

cause of action arose and the judgment in default, in order to compensate the Plaintiff for the period of time it has been 'out of its money', and during which, the Defendant was legally obligated to repay the money and, wrongfully, retained the benefit of it.

Date from which interest should run

28. In the absence of an agreed term as to the period of the loan or date for repayment, or whether the loan was repayable on demand, the law will readily imply a term that the loan was to be repaid within a reasonable time: *York Air Conditioning and Refrigeration (A/SIA) Pty Ltd v Commonwealth* (1949) 80 CLR 11 at 62.[6] The determination of a reasonable time is a question of fact and will depend on the circumstances of each case.

29. Having regard to the fact that:

    (a) the Defendant said he would repay the moneys "later";

    (b) the Plaintiff never specified a date for repayment;

    (c) the Plaintiff never required as part of the agreement that interest be paid during the period of the loan;

    (d) the Plaintiff started requesting repayment in 2016 (only weeks after the last tranche was advanced); and

    (e) the Plaintiff waited until 2019 to commence these proceedings,

    I consider that a reasonable period to repay what is, in Tonga at least, a sizeable sum, was 12 months.

30. The last of the sums making up the total loan was advanced to the Defendant on 23 December 2015. I round the 12 month period up to hold that the Plaintiff's cause of action arose (i.e. the Defendant breached its obligation to repay the loan when it fell due), and interest on the unpaid loan commenced to accrue (or 'run'), from 1 January 2017.

---

[6] Applied in *Questband Pty Ltd v Macquarie Bank Ltd* [2009] QCA 266.

Appropriate rate

31. The next issue is the applicable rate of interest.

32. It appears to be commonly accepted in the Kingdom for interest to be applied at the rate of 10% per annum. That figure is expressly prescribed in the Rules referred to above subject to the Court ordering otherwise. However, as also noted, O.30 r.2 applies only to interest post-judgment. Apart perhaps from a desire for parity, no submission was made, and my researches did not reveal any decision, which provides a basis in policy or principle for awards of pre-judgement interest to also necessarily attract a rate of 10% per annum.

33. Given that the award is intended to compensate the Plaintiff for being out of pocket for the relevant period, one would ordinarily expect to receive evidence that for instance the Plaintiff had to borrow to advance the loan funds in the first place or that because of the Defendant's breach in failing to repay the moneys within a reasonable time, the Plaintiff had been forced to borrow money in lieu in order for example to continue to support its cash flow. No such evidence was adduced here.

34. According to Mr Tatila, borrowing rates for housing loans in the Kingdom at present, are in the order of 8.5%. Personal loan rates are significantly higher; as much as 13%.

35. On the other hand, where a Plaintiff has not had to borrow, but has lost the opportunity to invest the subject money, evidence of available investment rates during the relevant period for institutional deposits or some other special potential investment opportunity, had the Plaintiff been in possession of the funds, would assist in arriving at an appropriate rate.

36. However, again, there was no evidence before me of any such 'lost opportunity' or rate of return the Plaintiff might have been able to earn had it been in possession of the funds. Mr Tatila stated, from the Bar table, that his own investment fund with the MBF Bank returns a rate of 6.5% per annum. Published term deposit investment rates offered by banks throughout the Kingdom suggest term deposit rates more in the order of 3% per annum. The National Reserve Bank of Tonga is currently publishing a weighted lending rate of 7.9% and a weighted deposit rate

of 1.95%. Strictly speaking, none of this was evidence adduced in admissible form. It was, however, the only information available. Whilst caution should be applied to such situations, the application follows from the original order (for final judgment on the debt) which effectively left interest and general damages, if any, to be assessed, and is therefore interlocutory.[7] The above banking information is publicly available, may reasonably be expected to be reliable and I have had regard to it.

37. In this case, I do not consider the rate of 10% per annum to be appropriate. In *Allied Foods v Moa*,[8] Ward CJ did not elucidate upon his award of 10% per annum. He simply made the order in accordance with the Plaintiff's claim for that rate. The only rationale stated was that the Plaintiff had been kept out of its money for a very long time despite the clear liability of the Defendant pay. While that may well explain the decision to award of interest up to judgment, in my view, and with respect to His Honour, it does not explain the rate.

38. The Plaintiff's submissions did not extend to any other decision, nor am I aware of any, which explains or proffers a sound basis for any rule or principle that pre-judgment interest should be awarded at the rate of 10% per annum in every case. As with the rule providing post-judgment interest, where the rate is specified at 10% *unless the court orders otherwise*, I consider it appropriate to set the pre-judgment rate here at other than 10%.

39. In the circumstances of this case, where there was no agreement for interest at all during the currency of the loan, to award 10% now could well result in the Plaintiff making a windfall gain beyond anything contemplated by the terms of its loan agreement. Civil litigation is not a State-sanctioned process for parties to attempt to generate profits from breaches of the law. The purpose of litigation of this kind is to provide redress or relief for breaches of obligations recognised by the law such that the innocent party is compensated for any loss and damage suffered as a result of the breach.

---

[7] *John Grant & Sons Ltd v Trocadero Building and Investment Co Ltd* (1938) 60 CLR 1 at 35; *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246; *Computer Edge Pty Ltd and another v Apple Computer Inc And Another* (1984) 54 ALR 767.

[8] Page 284.

40. Arguably, different considerations apply when it comes to post judgment interest. Once the court has ordered a Defendant to pay or repay an amount owed by it to a Plaintiff, and determined any and all issues concerning the Plaintiff's entitlement to the amount claimed, the longer a Defendant fails to abide by the order of the court, the more interest may be seen to impose some measure of sanction for the failure to comply with the order as well as compensating the Plaintiff for continuing to be out of its funds.

41. Having regard to the span of potential commercial rates which might be applicable as a means of compensating the Plaintiff being out of pocket, ranging from 2 to 3% at the lower end to the customary 10% for post-judgment awards or even higher where borrowing is involved, I consider that in this case, a rate of 6.5% per annum is a reasonable measure of compensation for the Plaintiff. It is perhaps slightly more than the prevailing investment rates, but it is below the customary post-judgment rate of 10% and well below the current personal borrowing rates.

Conclusion on interest

42. Applying that rate to the period from which I have decided interest will run (1 January 2017 to 22 January 2020), on a simple basis, the total interest comes to $5,528.32.

Claim for general damages for disappointment, stress and inconvenience

43. The Plaintiff's pleaded articulation of its claim for general damages was, regrettably, almost incomprehensible and susceptible to being struck out.

44. So too in her affidavit in support, Elsie Lautaimi, a clerk employed by the Plaintiff, deposed relevantly:

> *"9. That the Plaintiff is suffering losses where the law presumes the natural and probable consequence of the wrongful actions of the Defendant.*
>
> *10. That the Plaintiff is also suffering losses that is incapable of precise estimation such as highly stressful, stifling and dominating harshly, thereby caused by the wrongful actions of the Defendant."*

45. Those assertions were not evidence but rather an inappropriate attempt at submissions. If any part of them was intended to be evidence, it was inadmissible and/or of next to no probative value.

46. Mr Tatila's submissions on this claim included reference to the decision in *Latu v Pulu* [2013] TOSC 43. There, Chief Justice Scott held:

> *"[25] In view of Mr Fa'otusia's concessions it is not necessary to examine the law in relation to nuisance caused by noise in, a matter going to interest, he also submitted [9] that "of the Plaintiff proved that they suffered at least loss of half of their business for a period of over four years as from the 19.10 .2 thousand 15..." any detail. It is not however to be doubted that non pecuniary losses caused by noise resulting in annoyance, inconvenience or illness are recoverable (see e.g. Halsey v Esso Petroleum Co. [1961] 1 WLR 683). A useful commentary on the attitude of the Courts to noise pollution caused by the use of amplification for religious purposes may be found in the Commonwealth Human Rights Law Digest Vol. 6 No.1 Autumn 2007. The power of the Minister to control emissions of noise given by Section 9 of the Public Health Act 2008 may also be noted.*
>
> ...
>
> *[28] Having heard and seen the evidence I am entirely satisfied that the noise caused by the Defendants did in fact cause serious damage to the Plaintiffs business and I am satisfied that they should be adequately compensated for this loss by way of special damages.*
>
> ...
>
> *[30] I am satisfied that the Plaintiffs have proved that they suffered at least of loss of half of their business for a period of 6 months. At a rate of $800 per month this equals $4800.*
>
> *[31] I am also satisfied that the Plaintiffs have had to endure quite unreasonable and unacceptable noise for a similar period of time, albeit not continuously. I award $10000 general damages for the suffering thereby caused."*

47. Insofar as *Latu* involved a claim for damages for noise pollution, it is patently distinguishable from the instant case.

48. Otherwise, Mr Tatila's written submissions were devoted to the Plaintiff being out of its money for a long time; a matter going to interest. However, at [9], he submitted that "*the Plaintiff proved that they suffered at least loss of half of their*

business for a period of over 4 years as from 19.10.2015..." It is not clear whether this was a reference to the facts found by Chief Justice Scott in *Latu*, or whether it was intended to apply to the instant case. In any event, the affidavit in support makes no reference to this allegation. I disregard it.

49. Even if there was admissible evidence to support it, this claim must fail as matter of law. The general rule is that damages for anxiety, disappointment and distress are not recoverable in an action for breach of contract: *Archibald v Powlett* [2017] VSCA 259 at [62]-[65].[9] The principal exceptions to that rule are where the contract is one whose object is to provide enjoyment, relaxation or freedom from molestation,[10] and where the damages proceed from physical inconvenience caused by the breach,[11] such as breach of a building contract giving rise to physical discomfort or inconvenience.[12] The decision in *Latu v Palu*, in which an award was made for the Plaintiff having to endure unreasonable and unacceptable noise for a significant period of time, may be understood as a case falling within the said exceptions.

50. For those reasons, the claim for general damages is refused.

Costs

51. Mr Tatila filed a bill of costs totaling $1,450. He asked the court to tax the costs and fix them as part of this application.

52. The bill of costs contained arithmetic or typographical errors.[13] Once corrected, the total legal costs claimed was $1,555.

53. I have considered the items of work, times and rates claimed, the nature of the claim and what I consider to be the reasonable and necessary work required to advance the Plaintiff's claims including this somewhat protracted application for default judgment.

---

[9] Referring to *Baltic Shipping* (1993) 176 CLR 344, 361–3, 365 (Mason CJ), 380–1, 383 (Deane and Dawson JJ), 387 (Gaudron J), 405 (McHugh J).
[10] Ibid.
[11] Ibid 365 (Mason CJ), 383 (Deane and Dawson JJ), 387 (Gaudron J), 405 (McHugh J).
[12] *Perry* [1982] 1 WLR 1297, 1299, 1302–3 (Lord Denning MR); *Watts* (1991) 1 WLR 1421, 1441–1443; *Boncristiano v Lohmann* [1998] 4 VR 82, 94–5; *Nouvelle Homes* [2008] WASC 127 [76]–[82], [86], [100]; *Willshee* [2009] WASCA 87 [78]–[79]; *Campbelltown City Council* (1989) 15 NSWLR 501, 511–12 (McHugh JA). The last case was based on tort rather than contract.
[13] The hourly rate claimed was stated as $130. A number of items of work were timed at half an hour each but the amount claimed was $30 rather than $65.

54. Doing the best I can, I discount the sum claimed by approximately one third and fix the costs at $1,100. Mr Tatila indicated that he was content with that figure.

Result

55. Further to the order made on 11 November 2019, the Defendant is ordered to pay interest in the sum of $5,528.32 and costs fixed at $1,100.00, making a total judgment debt of **$34,445.20**.

56. Pursuant to order 30 rule 2, the judgment debt shall carry interest at the rate of 10% per annum from the date hereof until the judgment is satisfied.

57. It must be emphasized that the result in this case in relation to pre-judgment interest is not, and will not, necessarily be an answer or even necessarily instructive in other cases. The point to be made is that in every case where a claim is made for pre-judgment interest, all the relevant facts and circumstances of the particular case should be considered in determining, in the exercise of the court's discretion, whether to award such interest, and if so, at what rate and for what period. The ultimate issue is what is an appropriate order by which to compensate a Plaintiff for the legally recognized effects of the Defendant's breach.

SUPREME COURT TONGA

NUKU'ALOFA
22 January 2020

M.H. Whitten QC
LORD CHIEF JUSTICE