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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 7 of 2012

BETWEEN: AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED - Plaintiff

AND : 1. VA'A TOLOKE aka SOLOMONE LATU TOLOKE
2. MARYANNE TOLOKE
(both trading as TOLOKE ENTERPRISES) - Defendants

W. Edwards for the Plaintiff.

L. M. Niu SC for the Defendants

JUDGMENT

1. These are opposed applications by the Plaintiff (i) for summary judgment and (ii) for the Counterclaim to be struck out. A third application to amend the Defence and Counterclaim was not argued, however, it is disposed of as a consequence of my ruling on the Plaintiffs' applications.
2. The Statement of Claim was filed in February 2012. The claim is straightforward. The Plaintiff says that over the years it has provided financial assistance to the Defendants in connection with their home and vehicle import and dealership business. In 2008 the parties entered into a written agreement signed by the Defendants on 2 May

*rec'd 10/10/14
HKEI*

2008 which provided for a Housing Loan number 1425592 amounting to TOP \$239,176.00, an Indemnity guarantee amounting to TOP\$60,000.00 and a Term Loan facility number 1577271 amounting to TOP \$906,276.48.

3. According to paragraphs 7, 8 and 9 of the Statement of Claim the Defendants have defaulted in the repayments required under the agreement which resulted in notices of demand for repayment being served on the Defendants in February 2011 which demands have not been satisfied. The Plaintiff therefore sought:

(a) Judgment amounting to TOP \$123,718.62 being the amount owed on the Housing Loan as at 22 February 2011;

(b) Judgment amounting to TOP \$906,276.48 being the amount owed on the Term Loan as at 22 February 2011;

(c) Interest accruing at the rate of 11.65% from the date of the writ to Judgment; and

(d) Costs.

4. In a supporting affidavit sworn on 12 June 2014 Viliami Hia, a Loan Officer with the Plaintiff exhibits a copy of the May 2008 agreement, exhibits copies of the relevant bank statements and notices of demand and deposes that the amounts claimed are owed by the Defendants to the Plaintiff. He also exhibits an undated letter from the Defendants (Exhibit G) in answer to the letter of demand dated 28 February 2011.

5. The Statement of Defence was filed on 12 March 2012. The agreement of May 2008 was admitted however in paragraph 5 it is pleaded that "at the time the Defendants were required to sign the offer letter the Defendants were informed that their claim for losses

that they had suffered as a result of failure of the Plaintiff to provide funds for a shipment of a stock of motor vehicles from Japan in 2006, as it had agreed to do, and which had led the Defendants to expend and expended substantial sum thereon, was still being considered by the Plaintiff".

6. In paragraph 6 the Defendants plead that they were "led to believe" that the Plaintiff accepted this claim and that it would be credited "towards their loans". In paragraph 7 it is pleaded that the amount claimed by the Defendants "would almost have cleared their said loans", while in paragraph 9 it is pleaded that the Plaintiff had incorrectly calculated the interest repayments on the housing loan and had also promised not to charge the Defendants interest on their loans for a period of 12 months in response to the Defendants' claim.
7. No evidence was filed by the Defendants in answer to Mr. Hia's affidavit. Apart from the Defendants' undated 2011 letter already referred to there is no contemporaneous evidence that the Defendants had ever advanced a very substantial claim sufficient "almost [to] have cleared their said loan" following the alleged breach of an offer by the Plaintiff to provide funds in 2006. There is no written evidence in support of the Defendants' claims set out in the paragraphs of the Defence referred to apart from the 2011 letter written about 5 years after the breach by the Plaintiff now complained of. A request for further and better particulars of the circumstances surrounding the events of 2006 filed in December 2013 remains unanswered.
8. In his excellent written submission Mr. Edwards suggested that the Defendants had advanced no bona fide defence. Mr. Niu on the other

hand propounded the Defendants' claim arising from the alleged 2006 breach of promise by the Plaintiff. Given the existence of this claim he argued that it would be unjust not to give leave to defend.

9. The fact that a counterclaim has been filed is one consideration to be taken into account when deciding whether or not to allow an application for summary judgment. When the counterclaim arises out of the same subject matter as the claim and is connected with the grounds of defence unconditional leave to defend will usually be given. The connection between the counterclaim and the claim must therefore be considered together with the plausibility of the counterclaim.
10. The Plaintiffs second application is to strike out the Counterclaim on the ground that it is statute barred. As already seen in paragraph 5 above the Defendants claim that the Plaintiff failed to honour an agreement to provide funds for a shipment of vehicles "in 2006". The counterclaim is dated March 2012 which is well outside the 5 year period prescribed by section 16 of the Supreme Court Act.
11. In answer, Mr. Niu sought leave to amend the Counterclaim to allege that the shipment of vehicles was cancelled in 2007 and that the Defendants incurred the losses in that year, not in 2006. In my view the relevant date is not the date on which the Defendants chose to cancel the shipment but the date on which it is alleged the Plaintiff breached its promise to provide funds. That, in view of paragraph 5 of the Defence can only have been in 2006 at the latest. In my opinion the date that the alleged damages were suffered is also irrelevant in a

case of this kind where negligence is not pleaded (see *Gibbs v Guild* (1881) 8 Q B D 296).

12. In my opinion the Counterclaim must be struck out as being out of time and incapable of being brought within time by amendment. The counterclaim is additionally, as I find, not connected with the Plaintiff's claim at all but is wholly independent of it. I find the Defence to be unarguable and lacking in bona fides. In my view it is no more than a very belated attempt to vary a clear written agreement by unsubstantiated allegations of oral variation.

Result

Both applications are successful. There will be summary judgment for the Plaintiff in the amounts claimed and the Counterclaim is struck out.

DATED: 10 October 2014

E. Takataka
8/10/14

JUDGE

