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

NOT ON PACLII

CV 120 of 2011

BETWEEN: WESTPAC BANK OF TONGA

- Plaintiff

AND : 1. SIOSAIA MOEHAU
2. EPIC INTERNATIONAL LIMITED

- Defendants

BEFORE THE LORD CHIEF JUSTICE

R. Stephenson for the Plaintiff
'O. Pouono for the Defendants

JUDGMENT

Introduction

[1] This is an application for summary judgment by the Plaintiff made pursuant to Order 15 rule 2(a) of the Supreme Court Rules. The writ was issued on 23 November 2011 and a second amended statement of claim was issued on 18 April 2012. The amended statement of defence was filed on 26 June 2012.

[2] The principles governing such applications are conveniently set out in the commentary to Order 14 of the 1965 Rules of the Supreme Court [E & W] which may be found in the 1988 Edition of the White Book. "The purpose of [the Rule] is to enable a plaintiff to obtain summary

judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried". "When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff" (*Anglo–Italian Bank v Wells* (1873) 38 L.T. 197).

[3] The following affidavits were filed and will be referred to by their alphabetical numbers :

(A) Ashleigh Matheson, Bank Manager sworn 17 July 2012 ;
(B) Sioeli F. Nu'uhiva, Bank Manager sworn 9 August 2012 ;
(C) KiuFutuna Tatafu, Bank Officer, sworn 9 August 2012 ;
(D) Siosaia Moehau, sworn 1 October 2012 ;
(E) KiuFutuna Tatafu, sworn 9 October 2012.

[4] The following helpful written submissions were filed by counsel:

(a) R. Stephenson, 14 August 2012 ;
(b) 'O. Pouono, 9 October 2012 ;
(c) R. Stephenson, 9 October 2012.

[5] As will be seen from the first written submissions, Mr Stephenson relies on the following steps :

(i) On 23 April 2009 the First Defendant entered into and excuted term loan and overdraft agreements, copies of which are exhibits B and C to affidavit B ;

(ii) On the same day the Second Defendant entered into a deed of guarantee for the sums advanced but limited to T$921,000 (Exhibit F to affidavit B);

(iii) The advances, which are the subject of the term loan and overdraft agreements have in fact been advanced by the Plaintiff to the First Defendant ;

(iv) The First Defendant has failed to comply with the terms of the loan agreements and in particular with paragraphs 10 & 11 of the terms and conditions of the term loan agreement (see Exhibit C paragraphs 10 & 11).

(v) The First Defendant has failed to comply with the terms of the overdraft loan agreement and in particular with paragraphs 10 & 11 of the terms and conditions of the overdraft loan agreement (see Exhibit E paragraphs 10 & 11).

(vi) As a result of (iv) and (v) the whole sum advanced become due and payment by the First Defendant without the need for any notice to be served or given (paragraph 11.1(a)).

(vii) No repayment has been made by the First Defendant.

(viii) The Second Defendant has not complied with a notice of demand under the guarantee made on it on 1 March 2012 (Affidavit E exhibit U) and accordingly is liable to the Plaintiff to the extent of the sum guaranteed.

(ix) Mr Stephenson acknowledged that the whole sum due by the Defendants jointly and severally amounted at 23 November 2011 to $961.269.91 plus interest at the rate of 10.4% from the date of the issue of the writ to the date of judgment.

[6] In answer, the First Defendant did not deny:

(i) Entering into the loan agreements in April 2009 which were a restructuring of a 2007 loan agreement (paragraphs 2 & 26 of Affidavit D) ;

(ii) failing to meet the repayment obligations imposed upon him under the loan agreements and receiving demand for repayment of the sums advanced (paragraph 7 of Affidavit D).

[7] In paragraph 3 of the amended statement of defence the Defendants outline their defence. While the Defendants do not deny entering into the agreements, it is said that those agreements do not accurately represent the whole of the agreement reached between the Defendants and the Plaintiff. The Defendants say that they entered into these agreements because of assurances received from the Plaintiff that the terms of the agreements as recorded in writing would not be enforced owing to the difficult prevailing economic conditions. In the premises, the Defendants are not in breach of their obligations. Alternatively, it is said that it is unconscionable for the Plaintiff to attempt to enforce the agreements which were, in addition, recklessly entered into by the Plaintiff. The Defendants also say that the agreements reached were in breach of the Plaintiff's own lending guidelines as set out in the Commercial Credit Policy Mannual. By

way of further alternative, the First Defendant says that he was not given a sufficient opportunity to obtain adequate legal advice before entering into the agreements and that the proceedings by the Plaintiff against the Defendants are motivated by ill will : "I am much aware that the Plaintiff is attempting to skin me alive ... the Plaintiff is going to skin the First Defendant to the bone for stealing moneys from the Plaintiff, take off all that he got and bankrupt First Defendant" (sic).

[8] The issues of unconscionability, legal advice and want of good faith may be taken together. As a general rule, the parties to a contract will be held to the terms of the contract as agreed. The Court may however afford relief to a defendant when it finds that the bargain reached was oppressive, that the defendant suffered from bargaining weakness and that the plaintiff has knowingly taken advantage of that weakness.

[9] In the present case, the First Defendant says that he was given insufficient opportunity to obtain legal advice before entering into the agreements. In my view this claim is refuted not only by his own evidence but also by the documents which have been disclosed.

[10] In paragraph 2 of affidavit D the First Defendant concedes that :

> "Mr Stephen Stanton was acting for me and he was in Sydney. I did call him over the phone and he said to sign where my name was. There was no discussion of the contract".

This contrasts with paragraph 28 of the same affidavit in which the First Defendant states :

"That the signing of the agreement in April 2009, I remember asking my counsel if section "Q" of the agreement are covered in the contract agreement according to the First Defendant's understanding. Mr Stanton replied quickly to First Defendant over the telephone that they should already been covered".

This also contrasts with paragraph 31 in which the First Defendant states :

"That I know I should have faxed the documents to my lawyer for the proper legal advise it should have gotten before signing the Loan Contract Agreement".

[11] In paragraph 24 the First Plaintiff gives an account of his dealings with the Plaintiff prior to April 2009. In paragraph 24(n) he states :

"The Plaintiff then attempted to salvage problem in late 2008 to redo and restructure the Loan Contract Agreements between Plaintiff and First Defendant then new loan agreement was finally signed on April 23rd 2009".

In paragraph 26 he states:

"That the Contract Agreement signed in 2009 was the restructuring of the loan agreement in 2007".

[12] In paragraph 44 of his affidavit, the First Defendant refers to several other commercial ventures in connection with which he had dealings with the Plaintiff.

[13] Exhibit J to affidavit B contains four letters received by the Plaintiff Bank between15 April and 27 April 2009. Perusal of these letters reveals that Mr Stanton was intimately and actively concerned in the detailed negotiation between the Bank and the First Defendant which were taking place with a view to reaching an acceptable restructuring of the First Defendant's debt to the Plaintiff.

[14] Although only one of the letters refers to the Second Defendant in its heading (letter of 27 April) it is clear from the contents of the other letters that the Second Defendant's position was also under consideration. "Epic" is specifically referred to on page 6 of the letter of 15 April where a limited guarantee "was agreed to". In the letter of 20 April, Epic agrees to the "guarantee and the supporting mortgages". On page 2 of the same letter Mr Stanton states: "we are now ready to execute the agreements". In the penultimate paragraph it is stated that :

> "Mr Moehau is ready willing and able to attend to *all matters* that require execution by his corporate interests and himself in addition I also advise that the independent legal advice has been given to Kololia Apra Maka and that the excuted guarantee in satisfaction of the provision of that advice will also be supplied upon settlement". (emphasis added)

[15] From the evidence before me I am satisfied, first, that the First Plaintiff was at all times a professional and experienced businessman. Secondly, that he employed the services of a competent legal adviser to advise him in connection with his dealings with the Plaintiff. Thirdly, that he did not enter into those agreements

suffering from any form of bargaining disadvantage. Clause 16.1(a) and (b) of the terms and conditions of the agreement – exhibit C and E to affidavit B may also be noted.

[16] So far as the motives of a party seeking to enforce a binding contract are concerned, the general rule is that they are irrelevant. In the words of Potter L.J in *James Spencer & Co. Ltd v Tame Valley Pudding Co. Ltd* 8 April 1998 (unrep):

> "There is no general doctrine of good faith in the English law of contract. The (injured parties) are free to act as they wish providing they do not act in breach of a term of the contract".

In my opinion, the alleged ill-will of one of the Plaintiff's bank managers towards the First Defendant is irrelevant to the question of whether the Defendants have any defence to the action against them.

[17] The next question is whether it is open to the Defendants to claim that the agreements, as executed, do not correctly incorporate the terms of the agreement reached. The First Defendant, in paragraphs 4(c), 15, 19 & 21 of the amended statement of defence and again in paragraphs 25(i), 29 and 30 of affidavit D suggest that the terms of the agreement as recorded in writing were subject to other oral agreements that the terms of the written agreements would not be enforced.

[18] In his written submissions Mr Stephenson relied on Section 79 of the Evidence Act (Cap 15) which distinguishes between evidence of an

two or more directors since there is no requirement, save prudence, that a guarantee be written. Accordingly, Section 189(i)(c) of the Companies Act applies.

[23] I do not think that 2008 Global Financial Crisis has any relevance to the agreements entered into by the Defendants in 2009 and neither do I think that the events prior to 2009 can in any way affect the validity of the agreement subsequently reached. The First Defendant's signature upon the Business Finance Agreement on page 17 of Exhibit A to Affidavit B is in my view an unconditional acceptance that, despite anything that may have happen beforehand, the debt being restructed was in fact due.

[24] In my opinion the Defendants have not shown that they have any arguable defence to the Plaintiff's claim and accordingly there will be summary judgment as prayed.

DATED: 26 October 2012

M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
26/10/2012.