Solicitor General

IN THE SUPREME COURT OF TONGA **NO. C.609/95**
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : BANK OF TONGA - **Plaintiff**;

AND : 'ILAHOKO LIKILIKI - **Defendant**:

COUNSEL : Ms Tapueluelu for the Plaintiff
: Mr Piukala for Defendant/Counter claimant

Date of Hearing : 18th - 23rd May 1998
Date of Judgment : 21st September, 1998

ENTRY OF JUDGMENT BY FINNIGAN, J

The counter-claim in this action was tried before a jury at Vava'u on 18 to 23 May 1998. In general terms, the counter-claim was for (i) $100,000 for loss of profits from a claimed failure by the plaintiff to honour pledges to market the defendant's crops for five years, and (ii) $100,000 for pain anguish and loss claimed by the defendant as a result of claimed breach by the plaintiff of promises, and as a result of negligent and reckless statements and representations by the plaintiff. There had been a third counter-claim for (iii) $50,000 for pain anguish and loss claimed as a result of mismanagement and misrepresentations by the plaintiff about the defendant's accounts and documentation. The third counter-claim was not pursued before the jury.

The jury was required to answer 25 questions that had been agreed between counsel and settled by the court. At the conclusion of the trial I discharged the jury and adjourned the case for submissions from counsel regarding the form of the judgment. On behalf of the counter-claimant, Mr Piukala has filed detailed submissions, dated 28 May and 5 June 1998. On behalf of the counter-claim respondent, Ms Tapueluelu has advised that she has no further submissions, and invites the Court to enter the jury's verdict as is.

In his first submission, Mr Piukala submits that the answers of the jury to some of the questions reverse their answers to other questions. For this reason he submits that two of the questions and answers should be deleted. He submits further that the jury did not answer one question, except that its answer is obvious from its other answers, and from the directions that were given to them by the Court. He submits also that the answers to two of the questions conflict, and that clearly from that fact and the 'yes' answer to another question, the jury accepted the counter-claimant's claim for suffering pain and anguish. The final question he

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submits therefore was wrongly answered because it should have been answered as a sum of money. He submits that the court should now provide a suitable answer.

In his second submission, Mr Piukala submits that the answers indicate confusion and/or misunderstanding in respect of the questions, especially when the answers in respect of both counter-claims are considered altogether . He submits that in the circumstances however the totality of the answers given amounts to a finding by the jury that the counter-claims are proved on the balance of probabilities. Alternatively, Mr Piukala submits that the Court may itself decide the counter-claims by considering the evidence for itself and taking its own views into account along with the answers of the jury. If doing that, he submits, the Court should disregard all "no" answers. He has suggested also that if the plaintiff consents the Court may disregard the answers of the jury, on the basis that the counter-claimant now vacates his election of trial by jury, and proceed to a Judge Alone decision. For reasons which I hope are obvious, I put that submission aside.

Mr Piukala thereupon tenders submissions in respect of the pleadings and the evidence which I also put aside, on the basis that these are matters upon which submissions were made to the jury and determined by the jury. He then addresses the issues, and submits, correctly, that the only [single] issue in this case is whether the counter-claimant has proved on the balance of probabilities the allegations that were pleaded in the counter-claims. This issue, he submits, is an issue of fact, requiring findings of fact. This being so, I pause to comment that it was for the jury alone to make the findings of fact. Mr Piukala goes on to submit that, notwithstanding the nature of the answers, the answers show that the jury accepted his client's claims despite its apparent confusion and/or misunderstanding. He adds further submissions which are a credit to his diligence as counsel, which also I have considered, but which do not need to be set out here.

I have considered all these submissions of Mr Piukala. There was no dispute during the trial that the factual questions put to the jury were to determine the issues. In other words, there were between the parties no issues of law. My function at this stage of the trial is to assess the jury's answers to the questions of detailed fact, in order to see whether they decide the claims pleaded in the counter-claims. If they do, I must enter judgment accordingly for the party whose case is thereby established.

I have no doubt that the answers of the jury provide for the Court and the parties a clear determination of the issues that were tried.

At issue were two separate counter-claims for $100,000 each. The jury awarded nothing, and in doing so it answered 23 other questions which must be nothing other than statements of its factual reasoning while coming to that nil award. If those factual reasons support the nil award, that is the end of the matter. If they are not consistent with the nil award, that may be ground for a new trial.

I pause to comment that there is in all of this a lesson for counsel, particularly counsel for a plaintiff or counter-claimant. Restrict the issues stated for a jury to what is necessary. The first counter-claim required answers to 12 questions, of which only seven were necessary to decide whether the claimed award should be made. For counsel's benefit, these were questions 3,6,7,9,10, 11 and 12. Of these, in my opinion, the last four would have sufficed.

To the first six of these questions the jury answered "no". The answer to the seventh question then became inevitable. That question was, "How much profit did the claimant lose?" The answer was, "We do not have an answer." That can only mean, "We do not know if he lost anything," or, "We cannot say," or, "We cannot award anything." Any of those answers is a natural consequence of the answer "no" to the necessary questions of fact.

The second counter-claim required answers to thirteen questions. In my opinion, many of these were minor issues that should have been decided in the jury's minds while they considered the major issues. They decided them all, and some apparent inconsistencies are only apparent. The jury found, eg, at questions 21 and 22, that the bank withdrew all financial support from the claimant and that in doing so it was breaking its agreement with him. When it was then asked, at question 27, whether the bank broke any promises it had made to the claimant it replied that it had not reached any agreement. The questions separated the issues of agreement and promises, so they were considered as separate topics and got separate answers. So far as the breach of agreement was concerned, the jury clearly did not think it should be remedied by any award. So far as the vaguely-worded breach of promises was concerned, they could not agree whether there had been any. The onus was on the claimant to establish his claim of breach of promises on the balance of probabilities, and their answer can only mean that he had not.

Thereafter the jury answered two of the three crucial questions. First, it replied that the bank had not made any statements and representations to the claimant that were negligent and reckless. Second, it replied that he had suffered pain anguish and loss as a result of negligent and reckless statements and representations by the bank. These answers do conflict, so for enlightenment one looks to the jury's next and final answer, which removes all doubt. Asked how much money the bank should pay the claimant for pain anguish and loss that it had caused to him, they replied – and confirmed to the Court that they were unanimous – nothing. Their actual answer was "no", and it leaves no room for doubt about their verdict.

For these reasons, I determine this case by entering judgment on the counter-claim for the plaintiff. Counsel should try to settle costs by agreement, otherwise costs are to be taxed.

SUPREME COURT TONGA

Finnigan ACJ

NUKU'ALOFA 21ST **September 1998** **JUDGE**