

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : SHELL COMPANY (PACIFIC ISLAND) LTD : *Plaintiff*

AND : BANK OF TONGA : *Defendant*

BEFORE HON JUSTICE FINNIGAN

Counsel: Ms Tapueluelu for Defendant (Applicant)
Mr Appleby for Plaintiff (Respondent)

Written submissions received: 9 June 1999

Date of Ruling: 24 June 1999

RULING OF FINNIGAN, J

This action is brought by an account-holder ("Shell") against its own bank ("BoT") for payment on cheques that were drawn on another bank ("MBf") and dishonoured by that bank. The present application is an application by BoT to strike out the action.

Briefly, the pleaded facts of the substantive claim are that Shell sold petroleum to a third party, and in payment that third party deposited to Shell's account at BoT a number of cheques drawn on MBf which were dishonoured by MBf on presentation. MBf returned the dishonoured cheques to BoT. It is claimed that BoT did not tell Shell immediately of the dishonoured cheques, but "took an average of 14 business days to post the dishonoured cheques to [Shell's] account", and failed "to notify [Shell] for up to 30 days that the cheques had been dishonoured".

The claim is that BoT was (i) in breach of its statutory duty under s49 (n) of the Bills of Exchange Act cap108, and/or (ii) negligent at common law in the performance of an alleged duty. The duty is said to be "a duty to notify [Shell] within a reasonable time that the cheques had been dishonoured", but is otherwise unspecified.

THE SUBMISSIONS

The application to strike out the claim has proceeded on written submissions. I have considered these at length in order to ascertain the correct principles to apply. The statutory duty claim falls to be decided by the provisions of cap 108, the other by the principles of tort. I shall not refer to the submissions directly, but they are the foundation of the reasoning that follows. The issue is whether the statement of claim pleads any reasonable cause of action.

In responding to the submissions of counsel for BoT, counsel for Shell has applied to amend the statement of claim. He seeks to add reference to ss 45 (2)(b) and 46 (1). These

provisions relate to presentment and delay in presentment of cheques. There is nothing wrong in principle with amending a statement of claim at this stage, particularly where breach of statutory duty is alleged and the amendment is to add further statutory provisions. However I am mystified by the application and the brief submission in support did not cast any light. Presentment does not feature in the pleadings at all. The claim arises out of alleged delay in giving notice after dishonour upon presentment.

I agree with counsel for Shell, who submits that the issue I have to decide is not the factual and legal claim but whether in principle the action pleaded discloses any arguable claim. However I do not agree that all the plaintiff has to do is allege a duty, a breach of that duty and a resultant loss. For a reasonable cause of action the duty claimed must be specified and arguable. For that reason counsel for BoT was right to refer in argument to the pleaded facts, some of which were supplied by the statement of defence, and to the law pleaded in the statement of claim. Those submissions were not answered by counsel for Shell, except for a submission that in the absence of clear legal provision there should be full argument as to the meaning of the term "indorser". That submission also mystifies, since there is nothing I can detect, either explicit or able to be implied, that imports the indorsement concept into the pleaded claim

DECISION

The pleaded facts for the first claim are these. The third party owed money to Shell. Shell had an account with BoT. The third party paid cheques on its MBf account to BoT for collection from MBf and for credit to the account of the plaintiff. MBf dishonoured the cheques and returned them to BoT. For the first claim, it is alleged that BoT took on average 14 business days "to post the dishonoured cheques to [Shell's] account". In particular Shell claims that BoT failed to notify Shell on the day following dishonour, and thus breached s 49 (n) of the Act.

Pursuant to s 48, where a cheque has been dishonoured by non-payment as it was here, notice of dishonour must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged. A "drawer" is not defined, s/he is obviously the person who wrote the cheque. Neither is an indorser defined, but s 32 contains the necessary provisions. There is no indorsement, or anything that is said to be like an indorsement, alleged in the present case. The person to give the notice is, by s 49 (a), the holder. A holder is defined in s 2 for present purposes as the payee of the cheque who is in possession of it. Plainly in the present case BoT as agent of Shell was the holder.

A notice must be given within reasonable time of the dishonour, s 49 (m). The provision on which the plaintiff relies, s 49 (n), makes provision for what may be deemed reasonable time.

There are other relevant provisions in s 49. Pursuant to s 49 (f), notice is sufficiently given when the dishonoured cheque is returned to the drawer.

So the pleaded facts are that BoT, the holder of the cheques for collection, did not give notice to Shell, its own customer and its principal. I am bound to say that I can detect nothing in the first pleaded claim that is arguable. The claimed failure in statutory duty by BoT was a failure to act within a reasonable time as provided in s 49 (n). There is a claim of a prior statutory duty, that BoT was obliged to notify Shell that the third party's cheques had been dishonoured. There is no such duty laid on BoT by s 49. Neither has counsel for Shell

argued to refute the submission of counsel for BoT that there is no such statutory duty. That part of the claim is struck out.

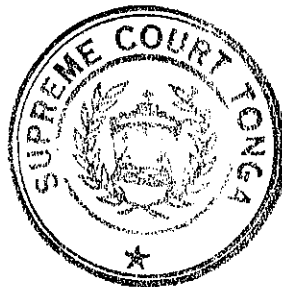
I turn to the claim of negligent breach of a common law duty. In the pleaded facts for this claim, Shell alleges that BoT failed to notify it within 30 days and "failed to return the dishonoured cheques to [Shell]". In the pleadings the duty was not specified, but that can be accepted, because negligence presupposes a duty of care. As well, the statement of claim pleads particulars of the alleged breach. These are claims (a) that BoT failed "to notify [Shell] for up to 30 days that the cheques had been dishonoured", and (b) that BoT failed "to return the cheques to [Shell], but instead returned them to the drawer". Do these claims raise a reasonable cause of action?

In my opinion the duty claimed is specified and arguable, as a claim of fact and law. No argument to counter that proposition was presented in submissions by counsel for BoT. Along with the claimed breach of duty was pleaded a brief claim that Shell suffered loss as a result, and a prayer for judgment for the total pleaded face value of the cheques. The second cause of action is sufficiently pleaded and will not be struck out.

COSTS

Costs on the successful part of the application are awarded to the defendant, and reserved pending the outcome of the substantive action.

NUKU'ALOFA, 24 June 1999



D. M. J. J.
JUDGE