

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CIVIL NO.775/96

BETWEEN : BANK OF TONGA : **Plaintiff**

AND : HINGANO HAUTAU : **Defendant**

BEFORE THE HON. JUSTICE FINNIGAN

COUNSEL : *Ms T Tapueluelu for Plaintiff*
: *Mr K Piukala for Defendant*

Date of Hearing : 22 October, 1999

Date of Interim Judgment: 22 October, 1999

Memorandum for Both Counsel

The Writ was filed 2 August 1996. It sought judgment for \$38,659.26 +12.5% from 31 January 1996 and for \$16,237.51 + 10% from 31 January 1996, and judgment for delivery of the securities. The lending commenced on 12 August 1987, and continued from then with the balance overdue steadily growing. The original security was what the borrower said was his house at Okoa. Other securities were added in December 1989. The last advance was on 13 July 1990, with the whole balance due for repayment by December 1990. The lender demanded repayment by a letter on 31 August 1994. It filed the action on 2 August 1996.

See the Supreme Court Act cap 10 s 16. The limitation period is 5 years. This Court has held in a previous case that the period (in that case) ran from the date of the demand. But that is not what s 16 provides in the circumstances of the present case, where the period must run from the expiry of the last loan agreement, i.e. from an unstated date in December 1990, unless a payment had been made since then. No payments since then are pleaded.

Prima facie then, judgment was not available to the plaintiff on its application for judgment by default. I invite submissions from counsel for the Judgment Creditor.

If the claim is out of time it is statute barred, and that is the end of the matter. However, at the hearing on 22 October 1999 I stated that I would mention other matters in respect of service.

In applying for judgment, counsel for the plaintiff filed an affidavit by a senior manager of the bank that purported to prove that service of the writ on 13 June 1996, over a year before the writ was filed. The supporting evidence for that improbable statement was a copy of a fax, in which the date cannot be read. It may have been 13 June 1997. The Court usually insists on original documents, had that requirement been observed, the mistake may have been avoided. The original has never been filed. The outcome is that there is no certainty that the writ was served.

Judgment was entered on 16 October 1997. Later an order was made for service of the judgment by registered airmail at "Faleniu, American Samoa". The date of the order is 24 October 1996. Subsequently a postal certificate was filed showing postage of the documents to that address, on 19 March 1998. In my view, even assuming the date of the order should have been 24 October 1997, the address was insufficient and there are too many errors here. That aside, the original judgment order has not been varied, and it directed service within 14 days of that order. As it happens, another order was made for service of these documents, on 6 February 1998. That order was made some weeks before the posting took place. But that order directed personal service, and it has still not been complied with. The errors are compounded, and the result is that the Judgment and its enforcement are now subject to challenge.

After I have the response of counsel for the Judgment Creditor to the first part of this Memorandum, and after I have clear and reliable evidence of the whereabouts of the Judgment Debtor, I shall arrange the Directions Hearing.

NUKU'ALOFA, 29 October 1999



Jimigan
JUDGE