IN THE SUPREME COURT OF TONGA NO.C.618/98
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN	:	SIUA FONUA	-	**Plaintiff;**
AND	:	MBf BANK LTD	-	**Defendant.**

Counsel	:	S. Tu'utafaiva for the Plaintiff H. Waalkens for the Defendant
Date of hearing	:	18, 19 and 20 January, 1999.
Date of judgment	:	29 January, 1999.

JUDGMENT

I have already given judgment to the defendant at the close of the plaintiff's case and said I would give my reasons in writing. I now do so. I also heard submissions as to costs and shall rule on those at the end.

In 1997, as part of a restructuring exercise, the Tonga Electric Power Board (TEPB) closed down its house wiring and retail sections. As a result the electrical goods and appliances held by the TEPB and worth approximately $300,000.00, were to be sold. The plaintiff decided to try and purchase all the stock and hoped to get it for something below half price.

He approached a Chinese businessman, Kevin Lee, to join him in the venture and to help provide the money necessary. I do not think it is necessary to set out the details of the arrangement between them and the evidence was far from clear. The plaintiff, Siua Fonua, at best, was unclear and inconsistent in his evidence to the court and evasive and dishonest at the worst. Under pressure he made rash statements and, at one point in cross-examination, made serious allegations against the Loans Manager of the MBf Bank (the Bank), which I am satisfied beyond doubt were untrue. Lee was called as one of the plaintiff's witnesses and his immediate reaction to those allegations confirmed my view. In many aspects of the case his evidence did not support that of the plaintiff. In any areas of dispute between them, I preferred the account given by Lee.

What is clear is that on 6 November 1997 the plaintiff obtained a business licence for a company called Update Electrical Supply (Update). On 15 November, Lee wrote to the General Manager of the TEPB confirming an offer of $124,100.00 to be paid on 21 November for the total stock. It was accompanied by a deposit of $3,500.00 in consideration of the TEPB locking the store between 15 and 21 November. The offer was accepted and the signatures of the representatives of the TEPB were witnessed, inter alia, by the plaintiff.

Lee and Fonua then went to the Bank and opened an account in the name of Update on which they were co-signatories. They applied for a loan and, on 18 November, the Bank sent a letter of offer for a loan of $185,000.00 to the plaintiff trading as Update. The letter of offer was a lengthy document setting out in detail the terms of the offer and the plaintiff signed an acceptance on 21 November "as per the abovenamed terms and conditions". The security for the loan included a cash deposit by Lee, a mortgage over the plaintiff's property at Matahau and a letter of pledge on the goods to be purchased from the TEPB. That letter of pledge was signed by the plaintiff on the same day.

The loan was to be repaid by installments and the first, a sum of $5,000.00, was due on 21 December,1997.

It is not necessary to set out the whole of that document but it constitutes the contract that the plaintiff claims was breached by the defendant bank. It sets out the terms of such things as purpose, interest, repayment and security none of which is remarkable. Later it states, under the heading "Events of Default":

> "Upon the occurrence of any of the following events at any time and regardless of whether the event is within or beyond the control of MBfBL and/or the Borrower: -"

There are then listed eleven specific events;

> "then, and in any such event, MBfBL may by written notice to the Borrower declare that an Event of Default has occurred and simultaneously or at any time thereafter, irrespective of whether any event mentioned herein is continuing, MBfBL may.... by written notice to the Borrower declare all outstanding amount, accrued interest thereon and any other sum then payable under this Letter of Offer to be immediately due and payable."

Of those eleven events, the following should be set out:

> "a) the borrower fails to make any payment of principal or interest or any other payment due under this Letter of Offer whether formally demanded or not: or
> c) the borrower ceases or threatens to cease to carry on its business; or
> h) a material change has occurred in the financial conditions of the Borrower which in the opinion of MBfBL is likely to prejudice the ability of the Borrower to perform its obligations under this Letter of Offer in accordance with the terms hereof; or
> j) in the opinion of MBfBL, the Borrower is not carrying on its business and affairs in accordance with sound financial and industrial standards and practices: "

Lee went to the TEPB on 24 November and paid the sum of $180,000.00 by a personal cheque and, on 25 November, reimbursed himself that sum by a cheque drawn on the Update account using, of course, the loan funds. Quite why the wrong sum was paid is not clear but the plaintiff wrote to the TEPB asking it to refund the balance to him and a letter from his solicitor followed on 2 December. The TEPB replied refusing to pay and pointing out that, as far as they were concerned, the plaintiff was a stranger to the sale.

On 5 December the plaintiff issued a writ against Lee seeking various orders in relation to the goods and, curiously as it was not a party to the proceedings, an order that the TEPB pay the balance of $55,900.00 to the plaintiff. The goods were by this time at Lee's premises so they could be sold; indeed the plaintiff had helped take them there. On 10 December Fonua obtained an interim injunction restraining Lee from selling or disposing of the stock and allowing the plaintiff to take possession of it. He told the court that he did so because he was concerned that he would be unable to meet the deadline for the first repayment and would lose his property at Matahau. As he clearly needed to sell the stock to raise the money for the first repayment, it was a most unfortunate step to have taken less that two weeks before the date it was due.

The Bank was becoming concerned by this time and a meeting was held on 11 December between the plaintiff, Lee and the Bank. It was held in the office of Lee's lawyer and was attended by the plaintiff's lawyer and a representative of the Bank. Although a draft agreement was made it was never executed by the parties. The Bank representative warned the plaintiff that, if he did not settle with Lee, the Bank would take action for possession of the stock.

After the meeting the plaintiff, his accountant and a different lawyer went to see the Loans Manager at the Bank, Mr Yeoh. The Bank officer referred to the court judgment the plaintiff had obtained and voiced the Bank's concern that the loan may not be repaid. He also advised the plaintiff that, if he and Lee did not repair their relationship, the Bank might seek an order from the court to take possession of the goods.

The plaintiff told the court that he felt that if he and Lee did not settle as Yeoh instructed, the Bank would get hold of the materials. Notwithstanding, the plaintiff tried unsuccessfully to take possession of the materials on 13 December.

On 15 December Yeoh wrote to the plaintiff's lawyer saying that the Bank understood the plaintiff and Lee were on the point of agreeing to settle and offering to release the plaintiff and his securities held under the letter of offer.

An agreement was drawn up and signed by Lee, the plaintiff and the plaintiff's counsel on 16 December. That agreement sets out the history of the matter and continues:

> "F. The Bank is desirous that this matter is resolved expeditiously and its interest is properly protected.
>
> G. The Bank has agreed in writing that upon settlement of the Court Action it shall take steps to release Siua and the related securities held under the terms and conditions of the Letter of Offer dated 18 November 1997."

The agreement then provided that the loan agreement between the Bank and Siua as in the Letter of Offer was to be changed to Lee and the plaintiff was released from all obligations under it. Lee was to continue to have possession of the stock and the plaintiff would have no further interest in its disposition. The plaintiff was to have $10,000.00 from Lee and the plaintiff should forthwith apply to the court to discontinue his action against Lee. On the same day Lee, Fonua and his counsel signed a "Memorandum of

Settlement and Discontinuance of Action" which was filed with the Court on 19 December 1997.

On 2 January 1998, the plaintiff's lawyer wrote to the Bank thanking them for their assistance in settling the matter and asking for written confirmation of the plaintiff being released from the agreement. On 8 January 1998, the Bank wrote to the plaintiff returning the original charge in escrow and confirming the account had been fully settled and duly closed on 30 December 1997.

The plaintiff claims that he was coerced into settling in those terms. It is correct that he took steps to have it set aside by the Court in January 1998 but he later withdrew that application. I am satisfied beyond any doubt the plaintiff made that settlement voluntarily and willingly and with a full appreciation of its meaning and consequences.

From those incidents comes the present claim.

He claims breach of contract the terms of which are encapsulated in paragraph 27 of the statement of claim:

> "27. The Plaintiff says that the defendant breached the agreement as contained in the "Letter of Offer" dated 18 November 1997 and accepted by the plaintiff on 21 November 1997. Particulars of breaches by the Defendant are one or more of the following:
>
> (i) threatening to take possession of the Stock when the Plaintiff's account with the Defendant was still normal and the Plaintiff has not breached the agreement.
>
> (ii) the Defendant interfering in the court actions between the Plaintiff and Mr Li, when the Plaintiff has not breached the agreements, and causing the Plaintiff not to be able to collect money from the sale of the stock to pay for the overdraft.
>
> (iii) The Defendant's threat to take possession of the Stock and also its interference with the Court actions between the plaintiff and Kevin Li caused Mr Li to have the stock and sell it for profit.
>
> (iv) The Defendant's threat to take possession of the stock if the court actions with Kevin Li is not settled and also its interference with the Court actions between the plaintiff and Kevin Li was biased and in favour of Mr Li. Particulars of bias are that the defendant wanted Kevin Li, who was not a party to the agreement between the Defendant and Plaintiff, to have possession of the stock and sell it for his own profit."

On the evidence I have heard from the plaintiff's witnesses, I am at a loss to see exactly what is the breach claimed.

Counsel for the plaintiff says that the Bank had no right to take any action under the contract because there had been no default by the plaintiff. The first payment was not due for some days and, until and unless he failed to pay, they had no right to interfere.

The evidence shows that, on the contrary, there were strong grounds for the Bank to consider there had already been an event of default. The plaintiff had obtained the loan on the basis of a business venture with Lee. The latter was not a party to the loan agreement but he was known by the Bank to be a partner of the plaintiff in the venture and had put up the cash security for the loan. The plaintiff chose to bring a court action against his erstwhile partner that changed the agreed arrangements for the disposal of the

stock of the company. The defendant had agreed the stock was to be sold from Lee's premises and had, himself, helped deliver it there. The injunction he sought and obtained from the court required the removal of that stock from Lee's custody and prevented Lee having any part in its sale. It is difficult to imagine a clearer adverse change in the financial conditions of the plaintiff or one more likely in the short term at least, (and the writ was filed only sixteen days before the plaintiff needed to pay the bank $5,000.00) to prejudice his ability to repay. By the time of the court order there were only eleven days to go.

However, the evidence does not show any action by the bank to declare the monies immediately due because of an event of default. What it did was to try and arrange a settlement that would solve the problems between the plaintiff and Lee and thus allow the sale of the stock to proceed. The draft settlement of 11 December was never signed but it was exhibited to the court and it includes, in the preamble, that the Bank is anxious that the terms, conditions and securities of the loan agreement and its interests are properly safeguarded, and it is desirous that this matter is resolved expeditiously. The terms that followed would have established a business arrangement that allowed the sales to continue from Lee's premises with financial and accounting procedures that would have ensured the plaintiff was fully aware of and able to check the whole sales transaction. Although it was not executed, it shows that six days after the plaintiff had taken out court proceedings and ten days before the first payment was due, the Bank attended a meeting that was clearly trying to save the business and, in that way, safeguard the plaintiff's position.

It was at that meeting that the suggested threat and interference in the court action referred to in paragraph 27 of the claim occurred. On the evidence of that meeting, it appears the Bank's representative may have taken an unfortunately heavy-handed approach but the evidence shows, first, that it was not a threat to take possession of the stock but a warning that, if the matter was not settled satisfactorily, the Bank would apply to the court for an order that it could take possession and, second, that far from forcing the plaintiff into a position whereby he would not be able to collect money from the sale of the stock, the unsigned draft agreement shows the settlement the Bank was trying to obtain was one that would have safeguarded the plaintiff's share of the proceeds.

The agreement that changed the situation was that of 16 December under which the plaintiff was released from the whole loan agreement. The plaintiff's case was that he only signed that because of the continuing effect of the threat to seek an order of possession, which Yeoh had also repeated.

I simply do not believe the plaintiff in that regard. He signed an agreement that let him out of all obligations to repay the loan, freed the home about which he was very anxious as he told the court more than once and allowed him to walk away with $10,000.00.

In view of my finding, it is not necessary to deal with the evidence of the damages claimed but I should mention that, had it been relevant, I do not find the plaintiff has discharged the burden of proving any loss. On the evidence I am satisfied he made an initial agreement with Lee to take a 10% share of any final profit. The plaintiff tells the

court that agreement was abandoned. I accept it may have been but there is no credible evidence to support the plaintiff's basis of calculating the sums claimed as lost profits and the evidence of Lee satisfies me that to this date there has been insufficient money received to produce an overall profit and that the chances of him clearing the purchase sum is remote. If the plaintiff were to succeed, of course, he would have to put the $10,000.00 he obtained from the settlement of 16 December into the balance also. However, I repeat, the evidence of loss of profits fell far short of that necessary to prove his claim.

Returning to the alleged threat, I have already described how, the day before the settlement of 16th, he received a letter from the Bank through his lawyer:

> "We understand that (Fonua) and Mr Kevin Li are on the point of agreeing settlement terms for their Supreme Court action.... Upon receipt of evidence of settlement, we shall forthwith take steps to release (Fonua) and the related securities held under the terms and conditions of the Letter of Offer dated 18 November 1997."

The terms of that letter suggest there had been discussion based on the plaintiff's oft repeated anxiety about the house he had offered as security. Be that as it may, the plaintiff saw that letter with his lawyer. He had a day to discuss it and to seek advice on it and then, with his lawyer at his side, he signed an agreement drafted by his lawyer that released him from an obligation he knew he could not meet in time and gave him $10,000.00 long before any profit was likely to be made.

As I have already said, I am satisfied the plaintiff signed that agreement willingly and of his own accord and it was only later that he thought of raising the, I am satisfied, bogus claim that he lost profit because of the undue influence of the Bank.

I have referred to the manner in which the reference to possession was made at the meeting on 11 December but I am satisfied that the Bank was doing no more than advising him of the possible consequences of the situation in which he, by his actions in bringing court proceedings, had placed himself.

The claim as set out in paragraph 27 is one of breach of contract and of undue influence. I find no evidence of breach by the Bank. In considering undue influence, the question for the court is, did the Bank go beyond the normal relationship of customer and client and did it result in a transaction so disadvantageous to the plaintiff that it constituted an advantage taken by the Bank that was only explicable on the basis of undue influence. If the evidence prima facie takes the case to that stage, the defendant will need to call evidence to rebut that explanation.

It always depends on the particular facts of the case. The position has been elegantly stated by Scarman LJ in National Westminster Bank v Morgan (1985) 1 AC 686, 709:

> "There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous

> transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case."

Earlier in the same judgment at 707, Lord Scarman states the position of a bank:

> "It was, as one would expect, conceded by counsel for the respondent that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence. This proposition has never been in doubt..."

As I have already stated, I am satisfied this was a case of the Bank offering the type of advice one might normally expect in a customer/ client relationship. The Bank was the party to the loan agreement with experience and expertise and was doing no more than warning the plaintiff of the problems he could be facing should the legal proceedings continue. The agreement of 16 December was also far from disadvantageous to him and, on the view I have taken about the merits of the claim for damages, it could accurately be described as advantageous.

The plaintiffs claim fails and I give, as I have already stated, judgment to the defendant.

I now consider the matter of costs. There can be no doubt that the usual rule applies that costs follow the event. The point that now falls for determination is whether the court can and should order those costs on a solicitor and own client basis as has been claimed by the defendant.

Mr Waalkens for the defendant points out that this claim could never have succeeded. His client has been put through the whole inconvenience and cost of contesting a thoroughly worthless action. The fact judgment was given following his submission at the close of the plaintiff's case confirms the total failure of the claim. He points to Mr Tu'utafaiva's reference to nonsuiting the plaintiff when he had, as he told the court, no more evidence to call on liability. Such an order is not available in this court and Mr Tu'utafaiva did not pursue it but Mr Waalkens suggests that counsel's reference to it showed he appreciated the inadequacy of his case.

In further support for his application, Mr Waalkens points out that he sought such costs in his pleadings so the plaintiff knew of his intention at an early stage. Further, on the Friday before the trial was to commence, he served a letter on counsel for the plaintiff in which he offered on behalf of his client, to allow Fonua to discontinue without paying costs – provided he did so that day. The plaintiff did not accept the offer and the trial proceeded.

Mr Tu'utafaiva disputes the right of the court to order such costs. O29r3 is, he suggests, clearly referring to party party costs. Every man, as he correctly points out, is entitled to

his day in court but that is a different point and I have never before heard the principle extended to suggest the day must therefore be cheap.

There is no dispute that the court has the power to order costs and section 15 of the Supreme Court Act gives the court a discretion to award them subject only to the terms of the proviso which is clearly not relevant in this case. Such a discretion must be exercised judicially and the general rule is that a successful party is entitled to his costs but it must be remembered that rule is qualified. It is instructive to consider, for example, one of the early statements on the exact nature of the rule in Cooper and Whittingham (1880) 15 ChD 501 as put by the, then, Master of the Rolls.

> "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part – no omission or neglect which would induce the Court to deprive him of his costs – the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the proceedings, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs...."

The position as to the court's discretion has since been modified, see for example, Donald Campbell and Co. Ltd v Pollak [1927] AC 723, but the rest of his remarks are still good law.

Order 29 governs the question of costs but does not assist on whether an award of costs must be limited to party/ party costs or may be made in relation to solicitor/ client costs. In those circumstances I am satisfied the discretion given by section 15 extends to making such an order.

Clearly the normal practice, in the absence of anything to the contrary in the judgment, is to tax a party's costs on a party and party basis. What, then, are the circumstances in which a court should order a losing party also to pay the costs normally billed by the solicitor to his client?

The principle in civil litigation is that the successful party should be placed, as much as is possible, in the same position as he would have been had the cause of action not arisen. The power to order costs is part of that principle. In a case where a defendant successfully resists a claim made against him, he may not be seeking any damages but, if he does not receive his costs, he cannot be said to be in the position he was before the litigation.

It has long been the practice in taxation that an unsuccessful party should not have to pay inordinate costs. Equally a successful party should be able to expect reimbursement of the costs reasonably needed to fight the action against him. Where, however, a totally worthless action has been brought, it must be reasonable to say that the person who has suffered the inconvenience and expense of defending an action that should never have been brought should not be left having also to pay the costs of fighting it.

It has long been possible to refuse to order costs even to a successful party where they have been incurred without reasonable cause or there has been undue delay. Similarly

the court has power to condemn a lawyer personally in terms of costs where they have been caused by his failure in some way to conduct the proceedings properly. There is no shortage of authority on both but I can find no guidance on the basis upon which the court should order costs at a different rate although I have found some support in the brief note in McGechan of the New Zealand case of Gate v Sun Alliance Insurance Ltd. It would seem reasonable to use the same test as for other orders of costs that do not abide by the usual rule of following the event.

In this case, the claim was not established and was unlikely ever to succeed. The duty of any lawyer is to advise his client on the chances of success and I assume that counsel in this case did so. When the defence was filed and the lawyer, no doubt, took further instructions on the conduct of the case, it would have been necessary to explain to his client that the defendant was seeking costs on a solicitor/own client basis and that, should he lose, it meant he could be ordered to pay higher costs than in a normal action. On the Friday before the trial was due to commence the defence gave the plaintiff a chance to discontinue with no costs to pay. Despite, no doubt, strong advice from his lawyer about this and the previous advice on his chance of success, the plaintiff chose to proceed to trial on a hopeless case.

The result is that the defendant has been put to the expense and inconvenience of an action he should have never had to face. An Order that the costs he recovers include those incurred as solicitor own client costs will ensure the defendant is out of pocket as little as possible in financial terms.

I order that the defendant shall have his costs and they shall be taxed on a solicitor and own client basis.

I add that there are too many hopeless civil cases being pursued to trial in Tonga. Future litigants must understand that, where their case is totally unmeritorious, the court will consider awarding costs on this basis even where they have not been sought on their opponent's pleadings. Lawyers equally must ensure they give their clients sound and firm advice about the chances of success and the consequences of pursuing a worthless case.

SUPREME COURT TONGA

DATED: 29th January, 1999.

CHIEF JUSTICE