IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CP. 173/92

BETWEEN : THE PACIFIC COMMERCIAL BANK a duly incorporated company having its registered office at Apia

PLAINTIFF

A N D : PAUL GRAY and TAULOGOMAI GRAY both of Malua Theological College, Pastor Trainee

DEFENDANTS

Counsel : Drake for Plaintiff
Enari for Defendants

Hearing : 17 March 1993

Judgment : 19 March 1993

JUDGMENT OF SAPOLU, C.J.

On 23 February 1993, I delivered a decision, which must necessarily be an interim decision, on the application by the defendants to set aside a judgment entered against them by this Court by formal proof on 24 August 1992. In my decision of 23 Feruary 1993, I disposed of certain grounds raised by the defendants in their application but left open the question of agreed interest rate as that question was not covered in the oral evidence called by the parties or addressed by counsel, even though it was disputed in the documents filed in this case. Thus the Court allowed the parties the opportunity to call oral evidence on the question of agreed interest rate at a later date.

On 17 March 1993, this case was again called and the defendant Taulogomai Gray gave evidence. She told the Court that the interest rate for her loan was 6% per annum. She was an employee of the plaintiff

at the time the loan was made and there was at that time a staff loan scheme in operation within the plaintiff bank which allowed members of the plaintiff's staff to obtain loans from the plaintiff at the interest rate of 6% per annum. Thus the interest rate allowed on her loan with her husband was 6%. This was confirmed by production in evidence of a letter of instructions dated 5 Septemer 1984 sent by the plaintiff to the solicitors for the defendants to prepare certain security documentation for the loan. One of the terms of the loan stated in the letter of instructions to the defendant's solicitors was that the interest was 6% per annum variable with interest to be debited monthly. Taulogomai Gray also denies that the interest rate of 6% per annum was to cease when a borrower leaves the employment of the plaintiff. She also says she is aware of other members of the plaintiff's staff who obtained loans at the interest rate of 6% per annum and who left the employment of the plaintiff before their loans were repaid in full but were still being charged 6% per annum interest. Apparently, Taulogomai Gray left the employment of the plaintiff 2 weeks after she obtained the loan for herself and her husband and soon afterwards departed for New Zealand.

Before her departure for New Zealand, she received a letter dated 23 October 1984 from the plaintiff advising her that the interest rate for her loan had been increased to 20% variable. She then went to see the plaintiff bank and was told by the then Manager for Marketing that he would rewrite the loan but the interest rate was to be 20%. The loan was subsequently restructured and the interest rate was reduced from 20% to 18%. It appears that Taulogomai Gray may have agreed to the 18% interest rate.

The evidence for the plaintiff was that an employee of the plaintiff was entitled to a lower interest rate for her loan from the plaintiff but once she leaves the employment of the plaintiff the normal interest rate applies. This was denied by Taulogomai Gray in her evidence. The loan

in this case was restructured and the interest rate of 20% was reduced to 18% and Taulogomai Gray accepted the reduced interest of 18%.

That is essentially the evidence adduced on the question of interest rate and the importance of this point lies in the fact that a very substantial portion of the amount of $21,795.10 for which judgment was entered against the defendants on 24 August 1992 is made up of accrued interest.

Now this is an application to set aside a judgment which was really a default judgment as the defendants failed to appear when the case was first called. The principle to be applied in such an application is contained in the case of Watson v Criscoe [1965] NZLR 35 where Wilson J held :

"I think that the true principle upon which the discretion will be exercised is that a judgment by default regularly obtained, will be set aside if it is made to appear that to refuse to do so may result in a miscarriage of justice. A defendant will, in most cases, conform with this principle if he satisfies the Court that the application is made bona fide and that there may be a good defence either in law or in fact."

It is clear therefore that in an application to set aside a default judgment regularly obtained, the Court must decide whether, having regard to what is disclosed in the affidavits by the parties, what is contained in any statement of claim or statement of defence filed, any oral evidence adduced, or any other relevant circumstances, it is in the interests of justice that the application should be granted and the default judgment set aside. The Court, in the exercise of its discretion, may also set such conditions as the interests of justice require.

In this case what we are dealing with is a loan made by the defendants from the plaintiff. I think the use of the word loan may not reveal the fact that what we are really dealing with in this case is a contract of loan money. Some people call it a loan agreement. But whatever label we give to the transaction in this case, that is, whether we call it a loan, a contract of loan of money, or a loan agreement, the fact

is that the transaction we are dealing with is contractual in nature. That being so, the ordinary principles of contract law apply to the loan in this case. It follows that it is important to ask oneself about what the parties agreed on as the terms or conditions of the present loan. The term of this loan which is now in dispute is the rate of interest payable on the loan. There is no dispute as to whether interest should be paid or not and so the Court is not concerned with that question.

As already pointed out, the defendants have given evidence that the agreed interest rate was 6% per annum. Subsequently the plaintiff increased the interest rate to 20% per annum when Taulogomai resigned from the employment of the plaintiff. When the loan was restructured the interest rate was varied again and was reduced to 18%. I am not entirely satisfied that on the evidence before this Court the defendants did agree to the subsequent variations in the interest rate. If the defendants did agree, it is not clear whether the new interest rates were to take effect from the dates of such agreement or some other dates. And if the defendants did not agree, it is also not clear on what basis did the plaintiff unilaterally increase the interest rates without the agreement of the defendants. As I have already said, a very substantial portion of the amount claimed against the defendants is made up of accrued interest. So the question of interest rate is of no little significance in this case.

In Chitty on Contracts, 24th edition, vol. 2 para. 3198 the general common law rule as to payment of interest is stated as follows:

> "At common law, the general rule is that interest is not payable on a .... loan in the absence of express agreement or some course of dealing or custom to that effect. Thus, in the absence of express stipulation, it has been held that interest is not payable on the price of goods sold, ... nor for money lent to the defendant...."

That principle may have been whittled down by developments in the law but the Court is not now concerned with those developments. There may also have been a new edition of Chitty on Contracts which is not available to the Court but I have no reason to doubt the correctness of the passage I have quoted.

In all then, I have come to the view that in the circumstances of this case, a miscarriage of justice may result if the application is not granted.

Accordingly the default judgment entered against the defendants on 24 August 1992 is set aside and a limited rehearing is granted only on the question of interest rate. Costs are awarded to the plaintiff due to the non-appearance of the defendants when this case was called and for consequential proceedings. I fix those costs at $200 which should be paid within 21 days in default the defendants will be barred from defending any further proceedings in this case.

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CHIEF JUSTICE