IN THE COURT OF APPEAL OF TONGA

ON APPEAL FROM THE SUPREME COURT OF TONGA

NUKU'ALOFA REGISTRY **APPEAL NO. AC 15 of 2010**

BETWEEN : 1. HUPETO KAITAPU

2. 'AHOSIVI KAITAPU

3. ANGUS NAUPOTO

Appellants

AND : AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

Respondent

Coram : Burchett J

Salmon J

Moore J

Counsel : Mrs Taufaeteau for the Appellants

Mrs Tupou for the Respondent

Date of Hearing : 11 April, 2011

Date of Judgment : 15 April, 2011

JUDGMENT OF THE COURT

[1] In this matter, the Respondent Bank issued and served a Statement of Claim against the First and Second Appellants, who are husband and wife. The Bank's claim arose out of four successive agreements for the loan of money, commencing with a loan made either on a date in December 2003 or on or about 5 January 2004 of the sum of $68,615.24 upon a housing facility. The successive changes to the loan arrangements occurred on 19 July 2007, 15 November 2007 and 8 February 2008, on the last occasion the facility being increased by an additional $2,403 to pay for an air ticket to Hawaii for the First Respondent to enable him, at his request, to get work there in order to pay the arrears into which the loan obligation had fallen.

[2] A Statement of Defence was filed by the said Appellants which admitted the original and further loan agreements, the amount (by then $104,134 plus the additional $2403) and interest rate (15.5%) and other terms of the final agreement, overdue demand and failure to repay. As a result, the Bank sought summary judgment.

[3] At the hearing, the First and Second Appellants called Mr Naupoto, the brother-in-law of the Second Appellant, as a witness. The effect of his evidence was that, because the First Appellant was not in employment at the time of the original loan agreement, the Bank was not prepared to lend to the First and Second Appellants, but he, being in employment, agreed to sign the agreement to assist his sister – on the basis, however, that she would be responsible for the repayments. There was no suggestion he received any part of the borrowed moneys. And there was no suggestion he signed or was involved in the

negotiation of any of the subsequent agreements. On the other hand, the First Appellant, having regained employment, did sign at least the first and last of the later agreements as a borrowing party. Neither the Bank's copy nor the borrower's (or borrowers') copy of the original agreement was produced at the hearing – apparently they had been lost or destroyed in the serious riot that occurred in Nuku'alofa.

[4] Shuster J, after he had heard the evidence, granted an oral application by the Bank to join Mr Naupoto as the Third Defendant (he is now the Third Appellant), "subject", as his Honour put it, "to informing the witness Mr Angus Naupoto of the court's intention and the case was adjourned [from 29 April 2010] to 7 May 2010 for the third defendant to attend court – and to be informed of this application". It will be apparent from the judge's language that Mr Naupoto was no longer present, and counsel accepted this was so.

[5] It may be his Honour had in mind that the Bank would serve a formally amended Statement of Claim or a notice of motion and affidavit on Mr Naupoto, but nothing like that occurred and nothing was said or done to ensure that Mr Naupoto had been notified in any way of the precise claim, or even the claim in general terms, now to be prosecuted against him. It follows that he was given no opportunity to present a case on his own behalf.

[6] What happened was that on 7 May, as the judgment records, "neither Mr Naupoto nor Mrs Taufaeteau appeared and so the court ordered Mr Angus Naupoto to be joined [as the Third Defendant]", and proceeded to enter judgment against the Appellants.

[7] In the famous case *The Commissioner of Police v. Tanos* [1958] 98 CLR 383 at 395-396, Dixon CJ and Webb J went back to Seneca and the Roman Law for the foundations of a rule they described as "a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must first be afforded an adequate opportunity of being heard…. It is hardly necessary to add", their Honours continued, "that its application [ie. The application of this principle] to proceedings in the established courts is *a matter of course*" (emphasis added). Unfortunately, in this instance, it was overlooked. The right to natural justice never depends on the strength of the party's argument – but here there are obvious possible defences to be explored. Was the Third Appellant really a guarantor, and if so, was the guarantee released upon ordinary principles when the agreement was changed and extended? Did he have a defence of a statute of limitation? Was all liability under the first agreement (the one he signed) expressly or impliedly released when the First Appellant came in as a party and the loan was extended?

[8] Without exploring the question of possible defences, procedurally what occurred was so defective that an imperative demand of justice required it be remedied. After the hearing of the appeal had proceeded a short way, Mrs. Tupou recognized this, and consented to the Third Appellant's appeal being allowed. Accordingly, we so ordered, and the order made below joining him as a party is set aside.

[9] That leaves the appeal by the First and Second Appellants. They are clearly liable on the final agreement, subject only to their being able to raise an equitable defence, as they claimed they could do. However, the evidence to which their counsel referred came nowhere near

establishing any equitable ground. It really went no further than to show that, perhaps because of harsh circumstances, they had been unable to maintain their repayments, or to measure up to the performance of their own proposals made to the Bank. This is not the material of which equitable defences are made. Their appeal must be dismissed.

[10] We turn to the issue of costs. To the extent that the Third Appellant incurred costs in respect of his appeal, he must have his costs against the Bank. The costs of the Bank, other than any incurred with reference to the Third Appellant, must be paid by the First and Second Appellants.

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Burchett J

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Salmon J

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Moore J