IN THE SUPREME COURT OF TONGA **APP.NO.19/99**

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : ***BANK OF TONGA*** - ***Appellant***

AND : ***SHELL COMPANY (PACIFIC ISLANDS) LTD***

- ***Respondent***

Coram : Ward CJ
: Tompkins J
: Beaumont J

Counsel : Ms T. Tapueluelu for Appellant
: Mr David Garrett for Respondent

Date of hearing : 12th July 2000.
Date of judgment: 21st July 2000.

JUDGMENT OF THE COURT

Introduction

Shell Company [Pacific Islands] Ltd ["Shell"] instituted proceedings in the Supreme Court against the Bank of Tonga ["BOT"], claiming judgment on two alternative causes of action pleaded by Shell in its statement of claim as follows:

The first cause of action, for breach of statutory duty, was pleaded as follows:

"1. [Shell] was at all material times a company specialising in the distribution of Petroleum Products in the Kingdom of Tonga.

2. [BOT] was at all material times a bank where [Shell] holds a bank account.

3. [Shell] sells Petroleum Products to independent dealerships, one of which is a dealership situated in Vava'u known as the 'Unameivaha Service Station.

4. The 'Unameivaha Service Station is operated by Lisa Mo'unga'evalu and Sione Mo'ungaevalu ('the Operators').

5. [Shell] supplied Petroleum Products on credit to the Operators at various times between July 1996 and June 1998.

6. In the payment of their account, the Operators deposited at [BOT] (Vava'u Branch) various cheques in the sum of $38,395.95 drawn on the MBf Bank ('the Cheques')

7. The MBf Bank dishonoured the Cheques and returned them to [BOT].

8. [BOT] was under a Statutory Duty pursuant to section 49 of the Bills of Exchange Act (Cap.108) to give notice to [Shell] within a reasonable time that the cheques had been dishonoured.

9. [BOT] took an average of 14 business days to post the dishonoured cheques to [Shell's] account.

10. [BOT] failed to notify [Shell] of such dishonoured cheques the following day in breach of section 49 (n) of the Bills of Exchange Act.

11. As a result of [BOT's] failure to notify, [Shell] suffered loss.

Wherefore [Shell] prays for:

12. Judgment in the sum of T$38,395.95 ...."

The second (alternative) cause of action was pleaded in negligence as follows:

"[Shell] repeats paragraphs 1-7 above and says further:

16. [BOT] owed [Shell] a duty to notify [Shell] within a reasonable time of the fact that the cheques had been dishonoured.

17. [BOT] was negligent in its duty to [Shell].

18. Particulars of Negligence

(a) Failure to notify [Shell] for up to 30 days that the Cheques had been dishonoured.
(b) Failure to return the dishonoured Cheques to [Shell], but instead returning them to the Drawer.

19. As a result of [BOT's] negligence [Shell] suffered loss.

Wherefore [Shell] prays for:

Judgment in the sum of T38,395.95 ...."

As has been seen, in its first claim Shell relied upon the provisions of s.49 of the Bills of Exchange Act ["the Act"]. Section 49 prescribes certain specific machinery provisions regulating what is to occur upon dishonour of a bill, to be mentioned shortly.

Notice of dishonour itself is dealt with generally by the preceding provision, s.48 of the Act relevantly as follows:

> "48. Subject to the provisions of this Act, where a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged ...."

Under the rules as to notice of dishonour laid down by s.49, it is provided, inter alia –

> "49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules: ...
>
> *(m)* The notice may be given as soon as the bill is dishonoured, and must be given within reasonable time thereafter ....."

It will be noted that s.49 does not provide that the collecting banker is to give the notice. We will return to this.

BOT applied under O.8 r.6 to strike out the whole of Shell's statement of claim on the ground that it disclosed no reasonable cause of action. A Judge of the Court ordered that Shell's first claim be struck-out, but refused to order the strike out of the second claim. BOT now appeals from this refusal. Shell brought, but no longer presses, a cross-appeal from the strike-out of its first claim. It follows that we are now concerned with Shell's second claim only.

The reasoning at first instance

In refusing to strike out the second claim, the primary Judge said:

> "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."

Conclusions on the appeal

A banker's duties to its customer in regard to the collection of cheques are well established at common law. As its customer's agent in this regard, a banker is bound to use reasonable care and diligence in presenting and securing payment of such cheques ; accordingly, a banker must always choose the speediest section of the clearing house system when presenting a customer's cheques for payment (see Holden, The Law and Practice of Banking, Vol.1 at 213).

As a corollary of this general principle, as Holden goes on to explain [at 215], a collecting bank must always give prompt notice to its customer upon dishonour. But this general law duty should be viewed as something which is [illegible] for other purposes.

Holden says (op.cit.):

Giving notice of dishonour

"6.32 A collecting bank must always give prompt notice to its customer if any cheque paid in by him for the credit of his account or cashed for him by the bank are dishonoured. The safest course to follow is to send written notice of dishonour to the customer on the same day as the unpaid item is received by the bank. Unless the bank wishes to make a claim against the drawer of the cheque as explained below, the bank will debit the amount of the cheque to its customer's account and return the cheque to him forthwith. This constitutes notice of dishonour.

6.33 The customer must then give prompt notice of dishonour to prior parties if he wishes to retain their liability. Any failure to give notice of dishonour in accordance with the rules laid down in the Bills of Exchange Act 1882 will usually have the effect of releasing the person to whom proper notice should have been given from liability on the cheque."

Likewise, Penn, Shea and Arora, the Law Relating to Domestic Banking say [at para. 9.04] :

"(xii) If a cheque is dishonoured, the banker must inform his customer as soon as reasonably possible, (so that he can give notice of dishonour to the drawer and others) and will be liable for any losses arising from the delay. The bank itself may give notice of dishonour (as agent) but rarely does. The usual practice is to return the cheque to the customer. Notice of dishonour must be given by the customer in a 'reasonable time'...."

We accept these explanations of the relevant principles.

Whilst the existence of the banker's common law duty to inform its customer promptly of dishonour is plain, the measure of damages to be awarded for breach of such a duty is another question. This will depend upon the particular circumstances, but generally speaking damages will be awarded to compensate for any losses flowing directly and naturally from the breach. Ordinarily, in a case such as the present, that is, the alleged failure to warn of an adverse event, the measure of damages will comprehend expenditure thrown away by the customer as a consequence of the banker's failure to warn the customer of the dishonour of the drawer's cheque. This could pick up any unrecovered cost of goods supplied by the customer on credit to the drawer, where that supply occurs in the customer's ignorance of the dishonour of the cheque as a consequence of the banker's failure to act promptly.

However, this is not the measure of Shell's second claim here. Rather, the claim is for the face value of the cheques. How a claim for that value could be maintained in an action against a bank under the general law for failing to warn a customer promptly of the dishonour of a cheque collected, did not appear from the pleading or from the argument before us.

It is true that under the modern system of pleading, upon a strike-out application, the question is whether it would be open to the plaintiff upon the pleadings to prove facts at the trial which would constitute a cause of action. But the terms of pleading of the second claim do not, in our view, disclose any reasonable basis to support the claim advanced, that is, a claim for the face value of the cheques. In other words, the pleading of the second claim does not indicate any reasonable or arguable basis for the existence of a cause of action for the recovery of the face value of the cheques. Other damages may arguably have been recoverable, but this was not pleaded. It follows, in our opinion, that the second claim should be struck out, either as disclosing no reasonable cause of action (O.8 r.6 (1) (i)) or as unclear (O.8 r.6 (1)(iii)). However, since the point is only a pleading question, Shell should be granted liberty to amend.

Costs

The primary Judge awarded BOT its costs of the strike-out of the first claim. Since the cross-appeal was not prosecuted, this order will stand. His Honour also reserved the costs of the application to strike out the second claim, pending the outcome of the substantive action. We see no reason to disturb this reservation, but upon the footing that, in the light of our conclusion on the pleading of this claim, Shell should not, in any event, be allowed its costs of pleading the second claim in its original form.

The costs of the cross-appeal should follow the event ; they are assessed at $100.00.

The costs of the appeal are more complicated. BOT has succeeded in the appeal, but not on the point it sought to argue. In those circumstances, there should be no order for costs.

Orders

Accordingly, we make the following orders:

1. Leave to appeal granted. Appeal allowed.

2. Set aside that part of the order made at first instance refusing to strike out Shell's second claim ; in lieu thereof, order that this claim be struck out, with liberty reserved to Shell to amend its statement of claim in this proceeding, as it may be advised, within 28 days.

3. Make no order for the costs of the appeal.

4. Cross-appeal dismissed. Order that Shell pay BOT's costs of the cross-appeal assessed at $100.00.

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WARD CJ

COURT OF APPEAL TONGA

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TOMPKINS J

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BEAUMONT J