IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 161 of 2009

BETWEEN: AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

- Plaintiff

AND : 1. MATAME'AFO'OU KAVAEFIAFI
2. KALOLAINE KAVAEFIAFI

- Defendants

Mrs P. Tupou for the Plaintiffs
K. Piukala for the Defendants

DECISION

[1] This is an application for summary judgment by the Plaintiff made pursuant to Order 15 Rule 2(a) of the Supreme Court Rules. The writ and Statement of Claim were issued on 2 July 2009 and the Statement of Defence was filed on 19 October 2009.

[2] The principles governing applications for summary judgment are conveniently set out in the commentary to Order 14 in the 1995 Rules of the Supreme Court (E & W) which may be found in the 1988 Edition of the White Book. "The purpose of [the rule] is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried".

"When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff (*Anglo-Italian Bank v Wells* [1873] 38 L.T. 197).

[3] As may be seen from the Statements of Claim and Defence it is not disputed that :

(a) in about May 2006 the parties entered into a housing loan agreement amounting to T$64,015.00;

(b) by January 2008 the amount owed had risen to T$107.488.00 and the parties agreed to the loan being restructured;

(c) in October 2008 the agreement was again varied and the Defendants agreed to repay the sums advanced by monthly repayments of T$1421.00;

(d) by April 2009 the amount owed had risen to T$109,372.00 as a result of the Defendants' failure to comply with the repayment terms of the agreement;

(e) formal demand for repayment of the amount due was made of the Defendants in April 2009 but repayment has not been forthcoming;

(f) the sum of T$109,372.00 with interest accruing at the rate of 12.5% remains unpaid.

[4] In the final paragraph of the application it is stated . that : "there is no serious conflict as to matters of fact or law as to provide an arguable defence to the claim".

[5] As will be seen from his submissions filed on 3 October 2012 in answer, Mr Piukala essentially relied on the defence filed just over three years previously. This is the defence that the contract should be set aside on the grounds of unconscionability. Mr Piukala emphasised that the Plaintiff knew or ought to have known that the Defendants (one of whom was in fact employed by the Plaintiff as a driver or cleaner at a wage of T$50 per week) and the other who was also a low paid worker, would not be able to comply with the repayment terms agreed.

[6] Mrs Tupou suggested that there was nothing to show that the Defendants had not entered into the agreement knowing full well to what they were committing themselves and the consequences of default. She pointed out that it was not in dispute that the amounts in question had been advanced and that the Defendants had received and used them. She also pointed out that when the loan was agreed to, the First Defendant had mortgaged his town allotment to the bank as security.

[7] In my view, the probability that the Defendants will lose their town allotment as a result of their inability to repay the loan assists the Defendants rather than the Plaintiff. While, from the point of view of the bank, the loan may have been satisfactorily secured, from the point of view of the borrowers, such a drastic consequence of the failure to repay made it even more important that they should, as a

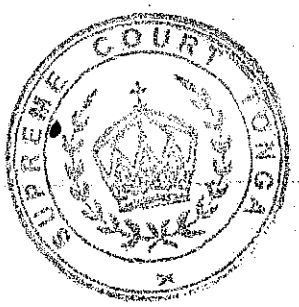
matter of reasonable estimation, have the ability to meet the repayment terms to which they became committed.

[8] In a number of cases the courts have been prepared to set aside contracts on the grounds of unconscionability (see *Blomley v Ryan* (1956) 99 CLR 362, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Westpac Banking Corporation v Paterson* [2001] FCA 1630; [2002] 187 ALR 168.)

[9] No evidence has been filed by the Plaintiffs to comment on or counter the Defendants' assertion that the Plaintiff induced them to enter into a contract which it knew perfectly well they could not afford to honour. If some assurances were given by the Defendants then no evidence of such assurances has been given. In a very small society like Tonga it is seems quite possible that what the Defendants assert (without contradiction) might be true. In other words, it does not seem to me that the defence is unarguable. This, of course, does not mean that, after full examination, it will succeed.

Result

1. The Application fails and is dismissed;
2. Defendants costs to be taxed if not agreed.



M.D. Scott

DATED: 26 October 2012. **CHIEF JUSTICE**

N. Tu'uholoaki
26/10/2012