

PACIFIC COMMERCIAL BANK LTD v NONUMALO (SOFARA)

Supreme Court Apia
Dillon J
2, 5 October 1992

CONTRACT - bank loan - personal overdraft - guarantee -
enforcement at selection of Plaintiff

COMPANY LAW - document not validly executed - not enforceable

HELD: The Plaintiff succeeded against the Defendant on
informal personal overdraft, personal term loan
and as signatory to family commercial loan, but
not as guarantor of company overdraft; not validly
executed. The Limitation Act 1975 was neither
pleaded nor argued.

LEGISLATION:

- Limitation Act 1975 - neither pleaded nor argued

R Drake for Plaintiff
K Sapolu for Defendant

Cur adv vult

1. This is a claim by the Plaintiff Bank to recover from the Defendant on (1) informal personal overdraft (2) personal term loan (3) Nonumalo family Commercial loan as signatory and (4) Marconi Way Propriety Company Ltd (Samoa) overdraft as guarantor, all such accounts dating back to 1983 and delinquent for some considerable time.
2. Neither the pleadings nor argument was directed to me in respect of the Limitation Act 1975.
3. Formal proof was given by the loans manager for the Plaintiff Bank as to the amounts claimed for debt, interest continuing up to 2.10.92 at 19% penal rate and the introduction of 8 exhibits. There was no evidence for the defendant, the defendant relying on cross-examination of the Plaintiff's witness and submissions

4. In respect of the family Commercial loan (3 above) and the guarantee of the company overdraft (4 above) objection was made that the defendant was singled out for action by the Plaintiff despite there being a total of 3 signatories and 10 guarantors of the family commercial loan (3 above) and 2 directors as signatories to the company overdraft (4 above). The Plaintiff, however, is entitled to select its most economical and productive course of action; has no legal obligation to pursue the principal debtor first and can select which borrower or security it will pursue. Any spreading of the Defendant's liability could have been effected by his joining into the action the other signatories and/or guarantors by Third Party notice prior to trial.

5. The Defendant has denied that he signed a formal contract of guarantee enforceable in law in respect of the company overdraft (4 above). The promissory note in favour of the Plaintiff is given by Marconi Way Propriety Company Ltd (Samoa) but there is no company seal affixed, merely the signatures of Lance Woodworth as managing director and Penelope Woodworth as director who have signed "jointly and severally". This is not a validly executed document such as to bind the company and accordingly the guarantee by the Defendant is not enforceable in law.

6. The Plaintiff succeeded in the first 3 of the 4 causes of action and judgment will therefore be entered for the Plaintiff as at 2.10.92 in the following amounts.

First cause of action	\$36,305.53	including interest
Second cause of action	4,379.50	including interest
Third cause of action	<u>15,486.66</u>	including interest
	<u>\$56,171.69</u>	

7. There will be costs and disbursements to the Plaintiff as fixed by the Registrar.