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 Trainees

DEFENDANTS

Counsel : Drake for Plaintiff Bank
Enari for Defendants

Hearing : 10 February 1993

Judgment : 23 February 1993

JUDGMENT OF SAPOLU, C.J.

On 15 July 1992, the plaintiff brought an action in this Court against the defendants claiming the sum of $21,253 being the residual balance of a loan the defendants obtained from the plaintiff in October 1984 plus accrued interest. That action was called for mention on 17 August 1992 and the defendants made no appearance. It was then adjourned to 24 August 1992 for formal proof and on that day this Court entered judgment by formal proof for the plaintiff in the sum of $21,795.10 which also took into account accrued interest from the date the action was filed to the date of judgment. The defendants were also ordered to pay costs.

On 16 October 1992, the defendants filed an application to set aside that judgment and for a new hearing to be granted. In support of that application, the defendant Taulogomai Gray swore an affidavit and testified in evidence that the reason for the defendants failure

to appear in Court on 17 August 1992 was because the senior loans officer for the plaintiff had told her on the phone on Friday, 14 August 1992, that she did not have to appear in Court on 17 August 1992 as the plaintiff's lawyer would adjourn the case for 3 months. Taulogomai Gray also deposed in her affidavit and testified in evidence that the defendants had believed all along that the proceeds from the sale by the plaintiff of their land which was used to secure their loan had settled in full their loan with the plaintiff. Allegations to the same effect are contained in the defendants statement of defence.

In opposing the application to set aside the judgment entered for the plaintiff on 24 August 1992 and to grant a new hearing, the plaintiff called oral evidence and the senior loans officer for the plaintiff also filed a sworn affidavit. In her affidavit and oral evidence, the senior loans officer for the plaintiff deposed and testified that she never told Taulogomai Gray on the phone on 14 August 1992 that the defendants did not have to appear in Court on 17 August 1992 when the plaintiff's action was to be called for mention. She also denied that she told Taulogomai Gray that the plaintiff's solicitor had advised that the action by the plaintiff was going to be adjourned for 3 months. She further told the Court that on 26 July 1992, Taulogomai Gray met with her at the plaintiff's premises and asked her if she, Taulogomai, had to turn up in Court on 17 August 1992 to which she replied that whether or not Taulogomai turned up in Court, the plaintiff would still proceed with the case and obtain judgment. She also, whilst Taulogomai was still present, called the plaintiff's solicitor on the phone and the solicitor advised that the plaintiff would proceed with formal proof.

On this part of the application, the Court in addition to having the affidavits filed by the defendants and the plaintiff also had the benefit of hearing oral evidence from witnesses by both parties and assessing the reliability and credibility of those witnesses. I accept,

to a certain extent, the final submission by counsel for the defendants that the essential question in this case is which version of the evidence does the Cout accept. In this regard, I prefer the evidence of the senior loans officer for the plaintiff to the evidence of Taulogomai Gray. TFMS Accordingly I came to the conclusion on this part of the evidence that the plaintiff did not by telephone inform Taulogomai Gray on 14 August 1992 not to appear as the plaintiff's solicitor was going to adjourn the plantiff's action for 3 months. What did happen was that the plaintiff told Taulogomai Gray whether or not she turned up in Court on 17 August 1992 the plaintiff would still proceed with its action and obtain judgment.

The plaintiff also called a former employee who testified that in early 1988 he went to New Zealand on a private visit and he took with him a list of the names of those people who were residing in New Zealand but owed money to the plaintiff. Amongst that list were the names of the defendants. He met with the defendants in Auckland and discussed with them the residual balance of their loan with the plaintiff and the question of repayment of the loan. His purpose was to collect money for the plaintiff. He also testified that there was no discussion between himself and the defendants about the sale of the defendant's land to meet their debt to the plaintiff. According to this witness, there could not have been any such discussion as he was not aware at that time that the defendants land had been sold. On his return to Samoa he noted down in writing his discussions in Auckland with the defendants and there is no mention in that writing of any discussion with the defendants about the sale of their land.

In view of this evidence by a former employee of the plaintiff which I accept, I have to reject the evidence of Taulogomai Gray that the defendants believed all along that the proceeds from the sale of their land cleared their loan with the plaintiff and were therefore shocked

and incredulous when they were served with a formal demand for $19,985.00 in February 1992. I am of the view that when the plaintiff's employee met with the defendants in Auckland at the beginning of 1988 and discussed with the defendants the residual balance of their loan with the plaintiff and the question of repayment, the defendants must have become aware at that time that they still owed money to the plaintiff and they did nothing to confirm whether they still owed money to the plaintiff.

Having said all that, there is one important matter which is raised in the statement of claim and denied in the statement of defence but was not referred to in the oral evidence. This is the question of interest rate. In the statement of claim the plaintiff says that the agreed interest rate for the defendants loan was 18% per annum. The defendants in their statement of defenence deny that that was the agreed interest rate and says no more on this point. The importance of this question is that it is clear that a very substantial portion of the amount claimed by the plaintiff and for which judgment has been given for the plaintiff is made up of accrued interest. However apart from the allegation in the statement of claim and the denial in the statement of defence there is really nothing else for the Court to go by.

I have anxiously considered how to deal with this disputed question of interest in view of the lack of supporting affidavit or evidence from either side in this case I have also considered whether a new hearing should be granted solely on the question of interest rate. After further reflection, I have decided to defer my final decision on the present application and to allow the parties the opportunity to call evidence if they wish to do so on this question of interest rate. I would therefore first ask counsel for the defendants whether the defendants wish to call evidence in support of their denial that the agreed interest rate for their loan was 18% per annum.

ADDENDUM

After the above decision was delivered, counsel for the defendants advised the Court he had not obtained instructions from the defendants whether to call evidence on the question of interest as it was his partner who had received the defendants' instructions. Accordingly the case is adjourned to the next mention date which is 8 March 1993 for counsel for the defendants to advise the Court whether they wish to call evidence on the question of interest. If so, then a date will be fixed for hearing that evidence as well as any evidence from the plaintiff.

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CHIEF JUSTICE