

HELD AT APIA

C.P. 61/92

BETWEEN: DEVELOPMENT BANK OF
WESTERN SAMOA carrying on
business as Development Bank
at Saleufi and elsewhere

PLAINTIFF

A N D: TUIMAUGA ELIU of Samata-i-tai,
Planter

DEFENDANT

Counsel: Mr L.S. Kamu for Plaintiff
Mr T.K. Enari for Defendant

Dates of Hearing: 3, 7 & 9 September 1993

Date of Judgment: 13 October 1993

JUDGMENT OF SAPOLU, CJ

In this judgment the Court will deal first with the plaintiff's claim and then with the defendant's counterclaim.

The plaintiff's claim:

The plaintiff is the Development Bank of Western Samoa (hereinafter for convenience referred to as "the Bank"). The defendant is a planter from the village of Samata-i-tai in Savaii. He obtained two loans from the Bank. The first of these loans was for \$20,000 to meet the cost of a second hand vehicle that the defendant wanted to buy for his plantation. That loan was made in December 1988 as evidenced by a loan agreement executed between the defendant and the Bank on 20 December 1988. Securities for that loan consisted of an instrument by way of chattels security executed over the vehicle purchased with the loan money and a personal guarantee by the wife of the defendant. The second loan was for \$5,000 and was for the purpose of establishing the

defendant's ten acres of taros. That loan was made in March 1989 as evidenced by the loan agreement executed between the defendant and the Bank on 8 March 1989. It was cross secured with the first loan with the additional security of a guarantee jointly signed by three persons including the defendant's wife.

The repayments for the first loan were to be \$500 per month commencing from January 1989 to January 1990, and thereafter the repayments were to be \$700 per month. For the second loan, repayments were to be \$120 per month commencing in April 1989. The defendant made regular repayments towards both loans but his total monthly repayments were most of the time below the total amount he was required under the loan agreement to pay per month. It was only for a few months that the defendant's total monthly repayments exceeded the amount he was required by the loan agreements to pay per month. As a consequence, the defendant fell into arrears with his loan repayments so that by 19 March 1992 when the Bank finalised its statement of claim, the defendant was in arrears by the sum of \$18,458.41. Since that date, the defendant has made further repayments so that as of 31 July 1993 the outstanding balance on both loans was \$8,251.24. The Bank now claims the amount outstanding on the two loans together with interest at 16% per annum.

At the hearing the defendant did not contest the evidence adduced by the Bank in relation to this aspect of the case but purported to let the Bank prove the defendant's actual indebtedness. On the evidence adduced by the Bank I am satisfied that as of 31 July 1993, the outstanding amount on the defendant's loans was \$8,251.24. The Bank's claim for 16% per annum interest was also not contested at the hearing and the Court also finds this part of the claim proved.

It was mentioned by one of the senior officers for the Bank at the hearing that Cabinet had recently issued a directive to the Bank to forgo all interests accrued on Bank loans for plantation purposes during the period 1990 to 1991 because that was the period when plantations throughout the country

were devastated due to the cyclones. However that directive, as the Court was informed during the hearing has not yet been effective. If and when that Cabinet directive becomes effective, some adjustment will have to be made to the amount owing by the defendant to reflect the directive by Cabinet.

The defendant's counterclaim:

In dealing with this part of the case, I propose to deal first with the law that applies before dealing with the evidence. On the pleadings in the counterclaim, and on the evidence called in support and in opposition to the counterclaim, I am of the view that the proper basis for the counterclaim should be in the tort of malicious arrest rather than malicious prosecution. Whether malicious arrest is a separate tort or encompassed under the umbrella of the general tort of abuse of process is not necessary to decide in this case as that point was not raised.

To succeed in malicious arrest, the person alleging malicious arrest must prove that the person he is suing had both maliciously and without reasonable and probable cause procured and brought about his arrest. In other words three matters must be proved. Firstly, there must be an arrest; secondly, the arrest must be malicious; and thirdly, there was ^{no} reasonable and probable cause for the arrest: see Roy v Prior [1970] 2 All ER 729 and the authorities cited in Todd, Burrows, Chambers, Mulgan and Vennell Law of Torts in New Zealand at p.781.

For the tort of malicious prosecution, there is in addition to the elements of malice and without reasonable and probable cause, the further requirements of criminal proceedings instituted by the person who is being sued against the person who is suing and that those proceedings terminated in favour of the latter: see for instance Fleming Law of Torts, 6th ed., at pp 576-577. The arrest in this case is unrelated to any criminal proceedings. It arose out of an application to the Court by the Bank for a writ to arrest the defendant who was about to leave the country and thereby evade payment of the outstanding balance of his loans with the Bank. So the tort of malicious

prosecution is not in issue in this case.

Now the evidence in relation to the defendant's counterclaim is very much in conflict. I will refer first to the evidence by the Bank and then to the evidence by the defendant.

The Manager of the Bank's branch at Salelologa in Savaii, (hereinafter referred to as "the Bank manager") who is a relative of the defendant and one of the paramount matais of the defendant's family at Samata-i-tai, says that in January 1992 he learnt from the defendant's brothers and brothers in law that the defendant was planning to leave the country to reside in Hawaii. So he told the defendant to come and see him at the Bank's Office at Salelologa but the defendant never turned up. Then in February 1992, the Bank manager says he met the defendant on the road and expressed his disappointment to the defendant for not coming to the Bank's Office at Salelologa. He also asked the defendant if it was true that he was leaving for Hawaii and the defendant replied that was true as he wanted to reside permanently in Hawaii to give his daughters a good and proper education. The defendant also said that someone in Lepea was going to buy his vehicle and the money from the sale of the vehicle was to be used to pay the Bank's loans. According to the Bank manager, he then told the defendant that he could not sell the vehicle without the consent of the Bank as the vehicle was the subject of an instrument by way of chattels security by the Bank.

Towards the end of the same month of February, a by election was held at the territorial constituency of Salega for the newly created second seat in Parliament for that constituency. The village of Samata-i-tai is one of the villages in that constituency and the Bank manager was one of the candidates for that by election. The defendant was an elector in that constituency. Before the election, the Bank manager says he had discussed with the defendant his trip to Hawaii and indicated to the defendant that he could assist the defendant with the trip and the defendant replied that Toomata Ropati, another candidate in the same by election was already assisting him with his trip. It was Toomata Ropati who later topped the poll in the by election and was

declared elected. The Bank manager denies that the outcome of the by election had anything to do with the subsequent arrest of the defendant. He says that he and the defendant are relatives and that the defendant assisted him in the by election. He also says that prior to the by election the defendant had told him that he was going to vote for him. After the election the defendant also admitted to him that he voted for him.

In early March 1992, the Bank manager was told in Apia by another staff member of the Bank that the defendant's vehicle was being advertised in a newspaper for sale and that he had called BP's travel service in relation to the advertisement. So on his return to Savaii, the Bank manager sent two verbal messages to the defendant to call in at the Office but the defendant did not turn up. He then instructed one of the Bank's loan officers at Salelologa to write to the defendant to call in to the Bank's Office for consultations.

On Monday morning, 16 March 1992, the defendant called in to the Bank's Office at Salelologa. He met first with the loans officer who had signed the letter sent to the defendant and then with the Bank manager in the presence of the same loans officer. The Bank manager they says that he expressed to the defendant his bitter disappointment about what he had done in advertising the vehicle for sale as he could not sell the vehicle without the consent of the Bank. In any event, the value of the vehicle at the time was probably less than \$8,000 which was not enough to pay off the then outstanding balance of the defendant's loans with the Bank. Even if the defendant were to find a good buyer, the vehicle could hardly be sold for more than \$10,000 which was still not enough to pay off the outstanding balance of his loans at that time. The Bank manager also denies that at that meeting he advised the defendant he could sell off the vehicle. He also says that at that meeting, the defendant advised him that he was going to Hawaii for a holiday in May. That was the month for school holidays and the defendant's wife is a school teacher. He became suspicious as the defendant had told him before that he was planning to go to Hawaii to reside there permanently. So he thought that the defenant was trying to mislead him.

Then according to the Bank manager, he found out two days after that meeting with the defendant that the defendant had come to Apia and once his family's travel documents were processed they would leave the country. He also says that he did not know at that time that the defendant was applying for an American passport and had paid a deposit of \$600 to the BP travel agent. He became concerned that if the defendant slipped away, he would be the person to get the blame. So he instructed the main branch of the Bank in Apia on 17 March 1992 for a writ of arrest against the defendant.

Aukusitino Rasch, the Bank's Manager for Research and Development says that it was around that time that he was looking for a vehicle to buy. He saw in one of the newspapers a vehicle being advertised for sale by one of the Bank's clients' in Savaii. He met in Apia the Bank manager and informed the latter about that advertisement. He also says that it appeared to him that was the first time the Bank manager became aware of the vehicle in question being advertised for sale. The vehicle in question was the defendant's vehicle which had been purchased with one of his loans from the Bank. The Bank's Manager for Research and Development says he can not remember the exact time he talked to the Bank manager about the newspaper advertisement of the defendant's vehicle for sale but it must have been February or March 1993 as he recalls it was finally in April in the same year that he bought a vehicle.

Faleolo Samuelu, a senior officer of the Bank says that he received instructions from the Bank's branch at Salelologa for a writ of arrest against the defendant and the necessary information for the application for a writ of arrest was also relayed to him from Salelologa. He then made inquiries with the BP travel agent. Subsequently an application for a writ of arrest was made to the Court. On 19 March 1992 a writ of arrest was issued. This witness does not appear to recall when the application for a writ of arrest was made and when it was issued. However, he does recall that the defendant called into the Bank here in Apia about the writ. He says that he advised the defendant to pay up half of the outstanding balance of the loans or \$8,000

before the writ of arrest would be withdrawn. He denies that he advised the defendant that if he paid \$5,000 the writ of arrest would be withdrawn.

Faleolo Samuelu also says that when he met with the defendant, the latter expressed disappointment with the writ of arrest and told him that the matter should have been dealt with in Savaii. The defendant also expressed disappointment with the Bank manager as he suspected that the Bank manager had done this to him because of his defeat at the Salega by election in February 1992.

Now the defendant in his evidence says that he did not receive any message in January 1992 from the Bank. Neither did he receive any of the verbal messages which the Bank manager says he had sent to him. The only letter he received from the Bank's branch at Salelologa was the letter signed by one Asi Potogi, a loans officer of the Bank. That letter was an enquiry whether it was true that the defendant was travelling overseas. He then called in to the Bank's branch at Salelologa on Monday, 16 March 1993 to see Asi who asked him if it was true that they were leaving for overseas. The defendant says that he told Asi it was true that they were going overseas but the date for their departure was uncertain as they were trying to sell the vehicle. He then went with Asi to see the Bank manager and he asked the manager if he could sell the vehicle but the manager replied the vehicle could not be sold without their consent. He then told the Bank manager and Asi that he will advertise the vehicle and when a buyer is found, he will return and let them know. As no buyer was found he did not go back to the Bank.

The defendant denies that he said anything at that meeting to the Bank's representatives that he was leaving for overseas in May. According to him, he told the Bank manager that he and his family had plans to go overseas for a holiday when they got a chance as his wife is a school teacher. He also says that according to his discussions with the Bank's representatives, until the vehicle was sold and the loans paid, they could not go overseas.

In cross-examination, the defendant says that the Bank manager and Asi agreed to him advertising the vehicle for sale. So he advertised the vehicle on 17 March 1992 for sale. On the same date he deposited \$600 with BP's travel service. He also says, that when he met with the Bank manager in February 1992, he told him that he was going with his family overseas but the exact date was unknown. He denies that he told the Bank manager in February that they were leaving the country permanently. He was planning to go with his family to Hawaii for only a month.

So the defendant suspects that the Bank's manager at Salelologa had initiated his arrest because of his defeat in the Salega by election in February 1992 as the defendant's arrest occurred about two weeks after the by election and he had made proper discussions with the Bank manager and Asi about this whole matter. However the defendant also says that he told the Bank manager prior to the Salega by election that he will vote for him at the election but he denies having told him after the by election that he voted for him.

Now the defendant's wife also gave evidence. She confirms the letter from the Bank to the defendant and that the defendant came to Apia on Tuesday, 17 March 1992 to advertise his vehicle for sale. She says that there had been plans for herself, the defendant and their children to go overseas for a holiday possibly in December 1992 but no firm date had been set for their departure. They started making arrangements for their trip prior to the by election in February 1992 but those arrangements had not firmed up when the defendant was arrested. They also had the intention to inform the Bank but they had not at that time made any firm travel arrangements to go overseas. Their travel tickets were to be processed with BP travel service where the vehicle was also advertised.

She also says that when they came to the main branch of the Bank in Apia about the writ of arrest, Faleolo Samuelu told them to pay \$5,000 to the Bank for the loans before the writ of arrest would be withdrawn. They

looked for that money and when they returned with \$5,000 to the Bank, Faleolo Samuelu was not at the Bank at that time. Subsequently the defendant was arrested pursuant to the writ and placed in Police custody until the following day when he was released on conditions. On that day, according to the defendant's wife, they were driving along Main Beach Road in Apia when Faleolo Samuelu came to them and apologised to them about the defendant's arrest.

The defendant, according to his wife, has been a well recognised man in their village and people were happy with him. But after the defendant's arrest, people of their village had been teasing him as to when he will go to America. The defendant has also been ignored in relation to certain matters within the village when before his arrest the defendant and his family were notified of all village matters. Even the defendant's wife had been teased by the village because of her husband's arrest.

That is essentially the evidence in this case. Given the conflicting nature of the evidence adduced by both parties it is the duty of the Court to decide judicially which evidence to believe and accept and which evidence to disbelieve or reject.

Dealing first with the evidence of malice alleged by the defendant, I do not accept the defendant's evidence that the Bank manager was actuated by malice because of his defeat in the by election. Both the defendant and the Bank manager testify that the former told the latter prior to the election that he will vote for the latter at the election. There is no evidence that the Bank manager knew that the defendant voted differently from what the defendant had told him. Although the defendant denies the Bank manager's evidence that he told the Bank manager after the election that he voted for him, that denial does not go to show that the Bank manager ever knew that the defendant did not keep his word that he will vote for the Bank manager at the election. So how can it be said that the Bank manager was actuated by malice against the defendant after his election defeat when all he knew was that the defendant had told him prior to the election that he will vote for him. There

is also no real evidence to suggest that the Bank manager had cause to suspect that the defendant did not vote for him as he promised. I find therefore that there is no evidence to support the allegation of malice made by the defendant that the Bank manager became malicious against him because of his election defeat. That is not the end of the matter in so far as the question of malice is concerned because if the defendant can show that there was no reasonable and probable cause for the Bank manager to initiate his arrest then the Court may infer that the actions of the Bank manager were actuated by malice.

In that connection, I think the crucial part of the evidence is what was said between the Bank manager and the defendant in their conversation in February 1992. According to the Bank manager the defendant admitted to him when they met on the road that he and his family were leaving to reside permanently in Hawaii in order to obtain a good and proper education for his daughters. According to the defendant he merely told the Bank manager that he was planning to take his family to Hawaii for a month. The source of the

Bank manager's information was the defendant's brothers and brothers in law. Neither party called the defendant's brothers or brothers in law so that the Court did not have the benefit of their evidence whether it is true that they knew that the defendant and his family were in fact leaving permanently for Hawaii. Be that as it may, I have had the advantage of observing both the Bank manager and the defendant in the witness stand and I find that the evidence of the Bank manager is to be preferred to that of the defendant.

Then follows the evidence as to the meeting on 17 March 1992 at the Bank's Office at Salelologa. Again there is a conflict between the Bank manager and the defendant's evidence as to what transpired at that meeting. Although there is agreement that the defendant told the Bank manager that he was planning to go to Hawaii with his family for a holiday, the Bank manager says he was suspicious of the defendant because of what he had told him before

that he and his family were leaving permanently for Hawaii. He also says that he did not advise the defendant he could sell off the vehicle. The defendant on the other hand says that the Bank manager agreed that he could sell off the vehicle to pay the loans and so he advertised the vehicle. On this point, I have also decided to accept the evidence of the Bank manager. There is the evidence of the Bank's Manager for Research and Development that when he met the Bank manager in Apia and told him about the advertisement in the newspaper of the vehicle in question for sale, the Bank manager's reaction was that of a person who only just knew then about the advertisement for sale of the said vehicle. This piece of evidence tends to support what the Bank manager says as opposed to what the defendant says.

After the most careful consideration of the whole of the evidence, the Court accepts the evidence by the Bank manager. The best that can be said for the evidence by the defendant is that it does not establish his counterclaim on the balance of probabilities.

As to the evidence in relation to what took place between Faleolo Samuelu and the defendant's wife at the main branch of the Bank in Apia concerning the writ of arrest and the payment of \$5,000 instead of \$8,000 for the discharge of the writ, I was more impressed with the evidence by the defendant's wife as opposed to the Bank officer's evidence. However as this part of the evidence is not now material to the defendant's counterclaim in view of the fact that the Court has decided to accept the Bank manager's evidence, I make no conclusive finding of fact on this part of the evidence.

Accordingly, I find that the Bank manager did not act maliciously in initiating the issue of the writ of arrest and that he had reasonable and probable cause for seeking a writ of arrest against the defendant. The counterclaim is therefore dismissed. Judgment is given for the plaintiff in the sum of \$8,251.24 which is the total sum outstanding on the defendant's loans as of 31 July 1993 together with interest at 16% per annum from the

same date to the date of judgment. Costs are also awarded to the plaintiff as fixed by the Registrar.

T. F. M. Sapala
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CHIEF JUSTICE