

Bank of Tonga v Kolo, Vete & Ma'u

Supreme Court, Nuku'alofa

Hampton CJ

10 C 1019/92, 836/92, 701/93

13 October, 17 November 1995

Judgment debt - execution - over house

Execution judgment for money only - forms of

Practice and procedure - forms of execution of judgment

20 The plaintiff, having obtained judgments for payments of moneys only, sought enforcement by the court by an "order granting possession" of the debtors' houses. The plaintiff had sued on loan agreements seeking judgments for sums of money, which it obtained. It then sought to enforce by writs of distress including seizure of the houses. Ward CJ on 21 April 1995 refused to include dwelling houses in the writs of distress based on their protection by O.26 r.7(2) S.C.R. 1991 and s54(d) Magistrates Courts Act. So the present applications were made.

Held:

- 30 1. A judgment for payment of a sum of money may be enforced (as in England) by 5 means - distress, garnishee, appointment of a receiver, charging order and committal; but an order or writ for possession (whether of land or buildings) is not available.
2. A judgment for the giving of possession for land can be obtained only in the Land Court and may be enforced by a writ of possession (again, as in England). If such a judgment includes a judgment for money to be paid then the writ of possession may include provision for enforcing the judgment for money.
3. A judgment for the delivery of goods may be enforced by a writ of delivery or committal (as in England) and such writ may include provision for enforcing
- 40 any judgment for money to be paid, included in the same judgment.
4. The present applications, therefore were dismissed as misconceived - the court had no ability to make the orders sought in these circumstances.
5. The form of originating proceedings (and judgment) controls the form of execution available.
6. (Obiter) discussion of form of security documents; whether a house is a fixture on land in Tonga or personalty; what form of originating proceedings (and whether in Supreme Court or Land Court) might be required; whether there are exemptions made for houses from execution under the incidental enforcement provisions of writs of possession (of land) and writs of delivery.
- 50 [Note - leave to appeal was sought by the judgment creditor. Leave was

refused and the ruling is reported immediately following.]

Cases considered:

- Bank of Tonga v 'Alatini & Muti [1991] Tonga LR 153
Peachey Property v Robinson [1966] 2 All ER 981
Barclays Bank v Bird [1954] 1 All ER 449
Nakau v Fua (Martin CJ 4/9/89) C6/88
Tu'ipulotu v Ma'afu (Lewis J 3/11/94) C 721/94
60 Bank of Tonga v Kolo & Ma'u (Ward CJ 21/4/95) C1019/92 & 701/93
Bank of Tonga v Vaka'uta (Dalgety J 7/2/94) C19/91
Bank of Tonga v Vaka'uta (Dalgety J 17/3/95) C 19/91
Bank of Tonga v Ulu'ave (Lewis J 28/2/95) C 311/94

Statutes considered:

- Magistrates' Courts Act, s54
Civil Law Act, ss3, 4
Land Act, ss 149, 151

70 Regulations considered:

- Supreme Court Rules 1991, O26 O.2
Rule of the Supreme Court (UK) O.45
Land Court Rules 1991, O.7

Counsel for judgment creditor : Ms Osmundsen
Counsel for Kolo & Ma'u : Mr Hola
Counsel for Vete : Mr Kaufusi

Judgment

The Issue

The real question here is as to the manner in which a Judgment for the payment of money can be enforced. Can such a Judgment be enforced, as sought here by the Judgment Creditor, in each case, by an "Order granting possession" of the house of the Judgment Debtor to the Judgment Creditor?

The Background

80 In each case the Judgment Creditor issued a Writ and Statement of Claim suing on a loan agreement (or loan agreements) and seeking Judgment for payment of a sum (or sums) of money.

In general terms the loan agreements were in a similar form to each other, and indeed were in the same form as commented on by the Court of Appeal in Bank of Tonga v 'Alatini & Muti (App 16/90 - judgment 7 June 1991 reported in [1991] Tonga LR 153). That form of loan agreement was subjected to some criticism in that judgment and I have been told, from the Bar, by Ms. Osmundsen that the Bank has now (but only recently, regrettably) changed its form of loan agreement.

90 So this present Judgment may affect actions the Bank may take on a large number of other loans. All counsel agree that this Judgment does have some general importance, as a result.

The loan agreements in question here all specify the parties, the purpose of the loan, the amount loaned, the mode of repayment, the interest and so on. The agreements go on to provide as follows (taken from the English version in the Vete case):-

"The Borrower pledges the following articles as security for the performance of this Agreement: Dwelling house and the Borrower agrees to preserve carefully the said articles hereby pledged

100 In the event of failure by the Borrower to fulfil his obligations under this Agreement then the Bank is entitled to take possession of the said articles pledged as security without further process of Law and the Borrower undertakes to give up control of the said articles on demand by the Bank."

The Judgment Debtors have all defaulted in payment under the loan agreements; but the Bank, apparently, has adopted a responsible policy decision not to take steps for possession until a Judgment has been obtained.

As a result, and as set out above, actions have been filed and claims made for the moneys outstanding.

In each case the Bank has obtained Judgments against the Judgment Debtors for the payment of various moneys, as follows:

110	in the <u>Kolo</u> matter, on 26 August 1993	-	\$18812.41
	in the <u>Vete</u> matter, on 28 August 1993	-	\$43216.02
	in the <u>Ma'u</u> matter, on 14 February 1994	-	\$14613.58

In each case the Bank has applied to enforce the Judgments by way of Writs of Distress, including making a claim for the seizure of the houses of the Judgment Debtors under such Writs of Distress.

120 Ward CJ. (in the Kolo and Ma'u cases) dealt with those claims to seize the houses by a Judgment of 21 April 1995. He refused the applications to include houses in the Writs of Distress, based on the protection of houses to be found in s.54(d) of the Magistrates' Courts Act (Cap. 11) which is made applicable to Writs of Distress in this Court by Order

26 rule 7(2) of the Supreme Court Rules 1991.

The Judgment Creditor (Bank) has not appealed against that Judgment and accepts it, as I understand.

The Judgment Creditor now applies to this Court of an Order granting it possession of the respective houses of the Judgment Debtors as a means of enforcing the Judgment Debt against each of the Judgment Debtors; and with a view to (as pleaded) disposing of and/or demolishing and/or selling as a whole or as salvaged materials, those houses.

The Jurisdiction of this Court

130 I wish to set out, now, the scheme for enforcement of Judgments of this Court (and of the Land Court), as I see it, and as such scheme may touch on, or possibly affect, these three (and other similar) cases.

A Judgment for the payment of money (other than a payment into Court) may be enforced by any one or more of five means (see Supreme Court Rules 1991 O.26 r.1):

- (a) writ of distress (O.26 r.7)
- (b) garnishee proceedings (O.26 r.9)
- (c) the appointment of a receiver (O.26 r.10)
- (d) charging order (O.26 r.11)
- 140 (e) if O.26 r.3 applies, an order of committal (O.26 r.12).

Those five means correspond to, and reflect, the enforcement provisions available in England under O.45 r.1 (of the Rules of the Supreme Court - the Supreme Court Practice, 1991). That rule provides that a Judgment or order for the payment of money (not being for payment into Court) may be enforced by one or more of the same five methods viz. by distress, by garnishee, by charging order, by appointment of a receiver and by committal (and sequestration).

150 It seems to me, therefore, that the Judgment Creditor cannot pray in aid the provisions of sections 3 and 4 of the Civil Law Act (Cap.25) and of our O.2 r.2(2) because the English law and rules of procedure as to enforcement of Judgments for payment of money are the same, essentially, as ours. Certainly it cannot be said that there is a lack of procedure, in this area, which can be filled by resort to the law of England.

It follows that if a judgment in the Kingdom, as in England, is for the payment of money, an order or writ for possession (whether of land and/or buildings) is not available as a means of enforcement. In the later submissions filed on behalf of the Judgment Creditor (of 27 October 1995) that was accepted by the Judgment Creditor.

160 A Judgment for the giving of possession of land, given the nature of land ownership in Tonga and given the provisions of the Land Act (Cap.132), can be obtained, in my view, only in the Land Court, through the jurisdiction given that Court in s.149 of the Land Act.

Such a Judgment may be enforced, pursuant to s.151 of the Land Act, by the issue of a writ of possession. O.7 r.(1) and r.(2) of the Land Court Rules 1991 apply and provide that (r.1) "an order for possession of land may be enforced by a writ of possession"; and (r.2) a form for such writ.

Again that method of enforcement corresponds to the position in England, in my view. O.45 r.3(1) provides that a judgment for the giving of possession of land may be enforced by a writ of possession and/or by committal (and sequestration).

170 O.45 r.3(4) provides that if the Judgment for the giving of possession of land has included in it a judgment for money to be paid, then the writ of possession may include

provision for enforcing that judgment for money. That is a necessary incidental enforcement procedure. But I stress it is incidental. It does not in England, as Ms. Osmundsen seemed to argue, allow a Judgment for the payment of money only, to be enforced by the issue of a writ of possession. Such a writ of possession can be issued only to enforce a Judgment for the giving of possession of land (I refer to two cases: the Judgment Creditor referred me to: - Peachey Property Corp. Ltd. v Robinson [1966] 2 All ER 981 is an example of this procedure which I have outlined immediately above; Barclays Bank Ltd v. Bird [1954] 1 All ER 449 is an example of the lender bank suing and seeking an Order for possession of land, under an equitable charge. It is not a case about the subsequent execution of such a judgment by the issue of a Writ of Possession. If a Bank wants possession of its security, in the event of a default, then a method it could use would be to sue for such possession and obtain a Judgment for such before seeking the issue of the Writ of Possession.

A Judgment for the delivery of goods can be obtained in this Court, and may be enforced by either or both (under O.26 r.2):-

- (a) a writ of delivery (O.26 r.8)
- (b) if O.26 r.3 applies, an order of committal (O.26 r.12).

Again those means of enforcement correspond to, and reflect, the enforcement provisions available in England, this time under O.45 r.4. That rule provides that a judgment for the delivery of any goods may be enforced by either or both a writ of delivery (or sometimes a writ of specific delivery) and an order of committal (and sequestration).

As with a writ of possession in England, so with a writ of delivery - such a writ of delivery may include provision within it for enforcing payment of any money adjudged or ordered to be paid in the Judgment for the delivery of goods. It is a necessary incidental enforcement procedure; and that is available in Tonga and is set out in O.26 r.8(2) and in the Writ of Delivery itself (Form 7). That provision does not allow a Judgment for the payment of money only to be enforced by the issue of a writ of delivery. Such a writ of delivery can be issued only to enforce a Judgment for the delivery of goods.

The Determination of the Issue and of the Applications for Orders granting Possession of Houses.

Given that the only Judgments in these cases are Judgments for the payment of money (and the pleadings in any event sought no other judgments such as for the giving of possession of land or for the delivery of goods) this Court has no jurisdiction or power or ability to make the orders sought. The applications will be, and are, declined. They are, in my view, misconceived.

On the basis of the present pleadings, and the Judgments (as above) I am not prepared to make declarations, as later sought by Ms. Osmundsen, that the Judgment Creditor has the right to possession of the houses; nor am I prepared to order sale of the houses (again as later sought by Ms. Osmundsen). In my view proper proceedings seeking judgments in those terms would need to be taken. Nor am I prepared, without proper application, to make an Order appointing a receiver.

Future Steps

No doubt the Judgment Creditor will take stock of its position in the light of this Judgment. I have deliberately avoided commenting at all on issues which may yet arise, some of which have been mentioned in argument, but which are not necessary for me to rule on in this Judgment. Such issues include:

- (a) what is meant by a "pledge" in the loan agreements.
- (b) what is meant in the Kolo agreement by the expression "pledges mortgage over town allotment plus loan agreement over house" (English version).
- (c) what is to be made, in Kolo, of the difference between the English version, as above, and the Tongan.
- (d) whether a house is a fixture on Tongan land or not (and the competing authorities on that e.g. on one side such as Nakao v. Fua (C6/88, 4 September 1989, Martin CJ) and Tu'ipulotu v Ma'afu (C721/94, 3 November 1994, Lewis J.); and on the other side such as Bank of Tonga v. Kolo & Ma'u (C 1019/92 and 701/93, 21 April 1995, Ward C.J.) and Bank of Tonga v. Vaka'uta (C 19/91, 7 February 1994, Dalgety J.).
- (e) whether, under the existing judgments, an application is able to be made to enforce them by applying to appoint a receiver (and what might be achieved by that) - O.26 r.1 and r.10. No such application to enforce is before me. I am not here to advise the Judgment Creditor about its potential remedies.

All I will say further is that, in these cases and for the future, where loan agreements such as these feature, if the Bank wishes to try and achieve seizure of a house then the Bank and its advisors will have to look at the form of the originating proceedings brought, which controls the form of execution available.

In particular the Bank will have to consider whether (a) it proceeds by way of Writ in the Land Court seeking Judgment giving possession of land (and if successful, presumably on the basis that the house is a fixture, trying to enforce such Judgment by Writ of possession), and/or whether (b) it proceeds by way of Writ in this Court seeking Judgment for the delivery of goods (and perhaps as well for payment of money, in future cases), (and if successful, presumably on the basis that the house is not a fixture, trying to enforce such Judgment by a Writ of delivery).

if the former course is taken what effect does the second command in the prescribed form of Writ of possession have (i.e. "seize property except his house"). Similarly then if the latter course is taken the Bank will also need to consider the effect, if any, of Form 7 i.e. the Writ of delivery and whether any exemption of a house can be said to be made by the general command number 2 which follows the specific command number 1 to seize and deliver the specified goods. If a house is the specified goods, does that command number 2 have any effect at all? I do not express any view on either of those matters arising from the forms of the two Writs. I draw them to the parties' attention. Those aspects have not been, and cannot properly be, argued before me on the present pleadings.

I add that I am aware of the undefended and/or unargued matters of Bank of Tonga v. Vaka'uta (C19/91, 17 March 1995) and Bank of Tonga v. 'Uluave (C311/94, 28 February 1995) where orders for possession of moel buildings were made, apparently after Judgments for payment of money only were entered. The point at issue here does not seem to have been raised at all, let alone argued, whereas I have had the benefit of extensive written and oral arguments, for which I am grateful.

Formal Orders

- (a) I decline the Judgment Creditor's various applications for possession on all three files.

- (b) Costs will follow the event i.e. the Judgment Debtors will have their costs as taxed by the Registrar.