# Taufaeteau v Bank of Tonga

Court of Appeal
Hampton CJ, Tompkins & Neaves JJ
App.12/95

24 & 28 May 1996

*Contract - banking loans - certainty - variation*
*Banking - interest - contractual terms - variations*

The appellant appealed from judgment in the Supreme Court rejecting all his claims against the respondent with respect to loan transactions including claims that the Bank could not charge interest at more than 8.5%; that interest over that rate plus insurance permiums and fees and charges deducted should be repaid; and that the Bank had fraudulently and unjustly enriched itself at the expense of the appellant and damages should be awarded.

Held:

1. The allegation of fraudulent conduct and unjust enrichment were correctly and forth rightly rejected.
2. The allegations that the interest rate provisions were too vague and ambiguous to be enforced were rightly rejected - the expression used was sufficient to convey objectively that from time to time interest rates would move up and down.
3. As to the premiums fees and charges they were agreed to by the appellant in a letter and although not in the loan agreements themselves, the letter was part of the documents in which the contract was to be found and therefore the parol evidence rule was not relevant.
4. The non-registration of the letter under the Contract Act did not prevent the Bank collecting the fees and charges. The Contract Act creates a bar to an action upon such a contract i,e, as to enforceability - an action for recovery by a plaintiff and not as here an action sounding in damages for alleged breach of contract.
5. The Bank, unilaterally, changed the loan category from residential housing to commercial and thereby charged higher interest, the judge below finding that the Bank was so entitled because of the change of use of by the appellant, without notice. There was no contractual provision allowing that and the judge below was wrong. The appeal was allowed as to that aspect only and the matter remitted back for evidence to be heard on it.

6. But the appellant had suffered no loss or damage as at all times loan moneys were outstanding.

Cases considered : Tonelli v Komirra Pty Ltd [1972] VR 737

Statutes considered : National Reserve Bank Act
Contract Act
Evidence Act

60

Counsel for appellant : Mr S.K. Taufaeteau
Counsel for respondent : Mr Appleby

**Judgment**

The Appellant (the Plaintiff in the Court below) appeals from a Supreme Court Judgment of 10 November 1995 rejecting all his claims against the Respondent (the Defendant in the Court below).

The claims and appeal relate to loan transactions, (and a number of documents recording those transactions), commencing in 1987 and 1988. At that time advances totalling $65000 were made by the Respondent to the Appellant for "housing" purposes, with two loan agreements and a mortgage being entered into by the parties.

The argument in the Court below, and here, was that the Respondent was wrong in charging more than 8.5% interest on the loans; that all interest over that rate should be repaid to the Appellant as well as all insurance premiums and commissions, bank fees and charges which, it was claimed, had also been deducted wrongfully and without contractual authority. In addition it was said that the Respondent had deliberately, and indeed "fraudulently" as alleged, unjustly enriched itself at the expense of the Appellant; and that not only were there moneys repayable, as already set out, but that both general and aggravated damages should be paid by the Bank.

In the Court below the trial judge, for reasons which seem sound to us, and which are factually based on the evidence he had heard, forthrightly rejected the allegations of fraudulent conduct and unjust enrichment. With his conclusions we agree. Those conclusions, to us, seem sound and appropriate.

The trial judge found that the Respondent Bank had made a mistake in calculating, charging and deducting interest from time to time at a rate higher than was allowed by law (i.e. by Order in Council gazetted on May 14, 1990, pursuant to s.40 of the National Reserve Bank Act (Cap.102) when the maximum interest rate chargeable for loan advances made prior to 1 July 1989 - thereby applying to these two advances in question - was set at 10% per annum; the Bank, mistakenly, having charged and deducted interest at 13.5%, that being the allowed maximum rate for advances after 1 July 1989).

The trial judge also found that when this was pointed out to the Bank it corrected the position, crediting the erroneously charged interest to the Appellant's account and adjusting the loan account accordingly (on which loan account a significant debit balance was then, and still is, outstanding i.e. the Appellant still has some way to go to repay the advances made to him by the Bank). $5,976.33 was adjusted back in this way prior to the trial; and the Respondent conceded, at trial, that a further $1,064.43 had yet to be credited back and the account adjusted accordingly. That would take the interest charged and deducted back to a maximum rate of 10% both as allowed by law and, as claimed by the Bank, as allowed by the contract with the Appellant.

The Appellants' arguments before us, apart from the unjust enrichment claim which we have dealt with, were founded on these 3 propositions:-

1. That the interest rate provisions in the 2 loan agreements of 25 August 1987 (Ex P1) ($50,000 advance) and 17 June 1988 Ex P2 (increased advance by $15,000) were so vague and ambiguous as to be both meaningless and unenforceable, resulting in the initial rate of 8.5% only being able to be charged for interest and without any ability in the Bank to increase that interest rate as it purported to do.
2. That the Bank could not, as it later purported to do, change the category of loan from residential housing to commercial, (when the Appellant apparently let

out his house without the agreement or consent of the Bank) and thereby increase the rate of interest chargeable (commercial rates being higher than residential housing rates).

3. That the trial judge was wrong in finding that the Bank could charge and deduct insurance premiums and commissions and bank fees and charges, based on a letter of 2 May 1988 by the Bank offering the further, increased, 1988 advance, which was accepted by the Appellant.

We see no substance to arguments (1) and (3) and reject them for reasons which we will express shortly. We will then return to argument (2), which we find has substance.

The loan argeements are both in the same phraseology. The interest provisions are identical each: "The rate of interest payable shall be 8.5% per centum per annum or such other rate as the Bank may from time to time charge it s other customers on a like account." The issue taken here, and in the court below, was with the words "or such other rate as the Bank may from time to time charge its other customers on a like account".

These words are not in our view vague or ambiguous, or too vague to be enforced, which were the Appellant's arguments. The judge below rightly rejected the arguments made by the Appellant. He found that by using that expression "the parties contemplated and ultimately intended that the Bank would be empowered and entitled to vary the rate. They said so expressly in the agreements P1 and P2. The expression used to record their intention is sufficient to convey objectively that from time to time interest rates would move up or down in line with the rate being charged other borrowers, the accounts of whom were in the nature of housing loan agreements like that made with the Plaintiff ...".

We see nothing in those conclusions, whether factually or legally, which can be said to be in any way exceptionable, let alone wrong. The agreements do provide a sufficient basis for a court to ascertain the nature of the obligation intended to be assumed. See, for example, the expression "current bank overdarft rate" held to be sufficiently certain in Tonelli v Komirra Pty Ltd [1972] V.R. 737.

The Appellant apparently claimed in the Court below that the interest rates "were intended to be, and should now be, constructed as" flat rates "of interest." The trial judge, rightly, rejected that. Leaving aside entirely on this issue the letter of the 2 May 1988 (which would support the Bank's argument, and the judge below) the twelve year mortgage signed by the Appellant of 8 January 1988 says this: "to pay interest at the rate of 8.5% per centum per annum or at the prevalent rate charged or chargeable by the Bank from time to time to its customers on a like account ....". Again those words are clear and unambiguous. The Appellant is an accountant. How he could claim that the authority was only to charge a flat rate of 8.5% is difficult to comprehend. Small wonder that the trial judge found that "the rate of interest to be charged by the Bank was variable at the instance of the Bank in both Exhibits P1 and P2 and according to the tenor and intent of the general agreement between the parties". We add that changes of rates of interest were clearly publicly notified in an acceptable form and manner. This agreement is rejected.

The next argument to be dealt with relates to the letter of 2 May 1988 (Ex.P.6). Two arguments were mounted, both here and in the court below.

First it was said that the letter could not be relied upon by the Bank as contractual authority to deduct insurance and bank charges (used in this judgment to cover insurance premiums and commissions, and Bank fees and charges) because of the operation of certain provisions of the Evidence Act (Cap.15) and that, therefore, the Bank was

restricted to the 2 formal loan agreements themselves which made no mention of such charges.

Secondly it was said that, even if the letter could be relied upon, the provisions of the Contract Act (Cap 26) - now repealed but still applicable to these transactions - would in some way prevent the Bank collecting such charges because the letter had not been registered under the Contract Act (as the loan agreements had been).

First as to the Evidence Act, the Appellants argument was based on the parol evidence rules in sections 78 and 79. It was submitted that the loan agreements (Exs. P1 and P2) only could be looked at, and that the accepted loan offer letter (P6) could not be prayed in aid by the Bank to fill in any deficiences (e.g. as to insurance and Bank charges). The short answer is in S.78 itself which says that "... where any contract ... has been reduced to the form of a document or documents, no evidence shall be given of the terms thereof except the document itself ...." The underlining is ours. The contract here is to be found in a number of documents including the loan agreements, (P1, P2), the mortgage (P5) and the letter (P6). All are executed by the Appellant.

The mortgage (P5) contains provisions as to insurance (clause 5) and as to default in payment of insurance premiums (e.g. clauses 12 and 18). The letter (P6) (which is endorsed by the Appellant in this way: "The abovementioned terms and conditions are acknowledged and accepted") has within it reference to "Special Conditions:- Insurance of the house in the Bank's name with policy to be held by the Bank. Mortgage Prepayment Insurance to be taken in the name of the Bank". Insurance and insurance charges were clearly contempleted and intended by the parties; and deductions of commissions and premiums were made with contractual authority.

As to the Bank fees and charges, provision for them to be deducted is clearly contained within one of the documents making up the overall contractual arrangements between the parties, i.e. in the letter (P6) which provides "A once only Establishment Fee of $250 will apply only for the increase in addition to other Bank and Statutory Charges. Full details of these charges will be available to you when you call to sign our documentation".

It is noteworthy that the loan agreements do not specify that they recorded or purported to record, exclusively, the whole transactions between the parties and that no other document could be looked at and relied upon.

The trial judge was correct, in our view, in concluding that the letter (P6) "forms part of the agreement between the Plaintiff and the Bank"; and that the Bank fees and charges were deducted properly and with authority.

As to the claims that the non-registration of the letter (P6) under the Contract Act meant that these various insurance and Bank Charges were not collectable, we agree with the trial judge's conclusion that the Contract Act cannot affect these transactions. Under the Act any agreement or contract as to money to be lent or services to be rendered has to be registered if any action to enforce the ontract were to 'be maintainable" (s.5). In our view the section creates a bar to an action upon any contract for "money to be lent or services to be rendered ..." if the contractual document or agreement is not registered. Here the letter (P6) was not registered separately; it was relied on by the Bank as authority for the deduction of the various insurance and Bank charges (made over a period of time and without any objection, apparently, having been made by the Appellant at all); therefore the Appellant claimed in some way that the agreements contained in that letter

were unlawful.

The argument in not sustainable. The relevant provision of the Contract Act (s.5) relate to enforceability i.e as the trial judge said, it relates to "an action for recovery by a plaintiff" and not to (as here) "an action sounding in damages for alleged breach of contract ..."

We now return to the Appellant's argument as to the unilateral change, by the Bank, of the loan category from residential housing to commercial; and the justification for thereby charging higher interest rates.

If the category stayed as residential housing, as it clearly started out in these transactions, then the Respondent Bank acknowledges that the highest interest rate it could have charged (from the start of 1991 or thereabouts as we were advised from the Bar) was at 9.5%. As set out above the Bank has recalculated interest back from 13.5% to 10% for various periods; so that another recalculation will be necessary (from 10% back to 9.5%), with further crediting back to the Appellant's account and adjustment of that loan account accordingly following our decision that the Appellant must succeed on this point.

The point is short. The original loan was "Purpose of loan: Housing" (P1) and the extension loan (P2) "Purpose of loan - Housing Increase".

The interest rate provision, as already set out, referred to variations of interest rate being tied to the rate the Bank "charge(d) its other customers on a like account".

The "like account" clearly related to residential housing accounts; and the trial judge so found.

The Appellant later rented the house out and the judge found that "the nature of the loan changed from a loan of a residential nature to a loan of a commercial nature" ... and "that there was no disclosure by the (Appellant) to the (Respondent) of the change to letting ... Was the Bank upon discovery of the letting simply entitled to alter the interest rate unilaterally? I conclude that the Bank was so entitled. After all the Plaintiff had wrought a change of use without notice".

With that conclusion we disagree. None of the documents (whether P1, P2, P5, P6) allowed for such to be done. There was no contractual provision spelling out any ability in the Bank to do that. Mr Appleby agrees that that is so. He comes back to relying upon the same reasoning as relied upon by the trial judge i.e. because one party "breached" the agreement viz. that the house being financed would be used only for his personal residential requirements, the Bank could act unilaterally as well.

The Bank had other remedies. Indeed it could ultimately call up the loan. In a lesser and not as drastic, way it could have renegotiated the terms and conditions of the loan with the Appellant (including the category i.e. residential or commercial, which would affect the interest rate). It chose not to do so.

It is bound by the same provisions of the loan agreements (and mortgage) as it acknowledged and on which it relied (as earlier set out) to say that it did have the ability to vary the rate of interest. Those documents referred to "a like account" i.e. to other customers with residential housing loan accounts. Those words were, and are, also binding upon it - and unless and until the contractual arrangements were properly varied the Bank was bound to charge and deduct interest at the rate applicable to residential loans and not charge and deduct, as it did, interest as if one a commercial loan.

So recalculation and adjustment will be required, and must be made by the Bank. That can, and should, be done in the manner in which previous recalculations and

adjustments have been carried out.

This Court is not in a position to carry out such recalculations. It is appropriate that we allow the appeal in relation to this aspect only and remit the matter to the Supreme Court for evidence to be heard, if necessary, as to the recalculations and adjustments. We would expect, however, that the Bank will be able to recalculate and adjust the figures without the need to further trouble the trial judge.

A claim was made on behalf of the Appellant that the Respondent should pay interest to the Applicant on all moneys recalculated and in effect recredited or yet to be recredited to the Appellant's loan repayments (i.e. on the $5976.33, the $1064.43, and the amount, as above, involved in the further reduction from 10% to 9.5%). With that we do not agree. At all times loan moneys were outstanding; fixed automatic deductions, as authorised by the Appellant (P6), were being made and put towards principal and interest (on the 12 year mortgage); it just means that the Bank put a greater part of those set figure automatic payments towards interest, rather than to capital repayments, than it should have done; and that the Bank must make the proper adjustments, from interest wrongly taken, into the capital repayments. The Appellant has suffered no loss or damage.

The Appellant succeeds on this appeal to the extent set out. He is entitled to costs which we fix in the sum of $1,000.00 and disbursements.

Given the limited success of the Appellant overall, but also given the mistakes made by the Respondent in calculating interest rates; the balance still needing to be recalculated and adjusted back ($1064.43) as at the trial in the Court below; and the present finding and the need for further adjustments we take the view that the award of costs against the Appellant in the Court below, should be set aside and that each party should bear their own costs in that Court.