IN THE SUPREME COURT OF TONGA **NO.C.1225/98**
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : *1. LINENI 'EPENISA* - ***Plaintiffs***
2. LESA 'EPENISA

AND : *TONGA DEVELOPMENT BANK* - ***Defendant***

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Tu'utafaiva for plaintiffs
Mrs Vaihu for defendant

Date of hearing: 22 May 2000.
Date of judgment: 23 May 2000.

Judgment

Since 1994, the plaintiffs have operated a tyre repairing business in Vava'u. When they first started they took a loan from the defendant bank in order to purchase the necessary equipment including two compressors. The bank told them that it was necessary to take out insurance on the equipment and that was done by the bank with the premium being added to the overall loan. Only the first plaintiff gave evidence and it appears all further transactions were carried out by him. I shall simply refer to him as the plaintiff hereafter.

It appears that the motor on one of these burned out and was not repaired. The plaintiff then obtained another compressor by means of another loan from the bank. The motor on that one also burned out. There was evidence that the plaintiff claimed or attempted unsuccessfully to claim from the insurance but that is no part of this case although it must be said that the evidence suggests that, had those claims been properly pursued, they might have been successful.

By then, the plaintiff was beginning to think that he ought to have a larger compressor and, in November 1996, he found someone who had brought such a compressor from the United States. By restructuring the loan with the bank he was able to purchase that compressor.

Again he was advised that the bank would require it to be insured. In view of his earlier experiences, he demurred but was told it would have to be done. He asked the Insurance Officer at the bank what would happen if this motor burned out like the others and was told it would be covered by the insurance.

By March 1997, the motor had burned out and the plaintiff sought to claim against the insurance. It was not met and so he sues the bank for the repayment of the premiums, for the loss of the compressor and his loss of earnings resulting from the inability to use the compressor.

As the evidence has emerged that claim has had to be modified to some extent.

The plaintiff's evidence was that he asked the insurance officer at the bank a number of times for a copy of the policy before the motor burned out but was never given it.

It appears from his evidence that the insurance officer suggested he should arrange for a person called Muller to repair the motor which he did. That repair worked in an unsatisfactory way for three to four weeks before the compressor broke down again. The repair cost $100 and the insurance officer from the bank advised him to pay it and it would then be reimbursed by the insurance company. He paid but has not been reimbursed.

The plaintiff again went to the insurance officer at the bank and, a week or so later, two men came to inspect the machine. The plaintiff was later told that the insurance would not pay.

The plaintiff claims for the loss of the earnings caused by the machine's failure from that time to the present but he told the court that he did in fact have the compressor repaired in January this year.

The defendant called two witnesses and their evidence gave support to the some aspects of the plainiff's claim.

The manager for the Vava'u branch of the bank explained that the policy of the bank in such cases is always to require insurance cover for fire and hurricane. I accept that is the policy but it is clear that is not the cover paid for in this case. The policy is for fire and earthquake and expressly excludes hurricane.

He explained that the forms proposing insurance must be filled in before the loan is processed and they are then sent to the bank's head office and forwarded to the insurance company.

The documents produced to the court show that there was a policy for fire and earthquake taken out on 28 March 1996 for the building and equipment, including the original compressors. There is nothing on the bank files to show that it was extended to cover the bigger compressor. The manager told the court that in such a case where there was already a policy in existence, they would not take out a new policy. He agreed with counsel for the plaintiff that the insurance company should have been advised of the new bigger compressor but there is nothing on the bank file to confirm that occurred.

The claim supervisor from the insurance company was called and he stated that there was never any such advice given.

It is true that the documents do show that, on 21 November 1996, the bank in Vava'u sent a memorandum to the head office in Nuku'alofa listing a number of new proposals and renewals of policies. It includes, in the new proposals, the plaintiff's name and is plainly a reference to the new compressor. However, there is no evidence it was ever passed to the insurance company and, indeed, in a letter dated 1 August 1997 from the insurance company to the bank referring to the plaintiff's claim there is a request for further information. The questions asked demonstrate clearly that the bank had not sent any advice about the new compressor to the insurance company.

The letter of 1 August is of further interest because it refers to a Business Protection Policy. The claim supervisor told the court that such a policy would cover burning out of an electric motor but limited to motors of 4 HP. The letter points out that the new compressor was 5 HP and was not covered.

The witness from the insurance company told the court that they have never had a reply form the bank with the information sought in the letter and the claim was eventually disallowed.

On the evidence as a whole, the plaintiff has satisfied me on a balance of probability that the insurance officer in the bank did inform him that the policy would cover the burning out of the motor and that the plaintiff relied on that assurance.

Whilst I find it a remarkable state of affairs, I have no reason to doubt the evidence of the insurance witness that the ordinary fire and earthquake policies were all fused into business protection policies so that burning out of the motors was covered. That would mean that the earlier, smaller motors may have been covered but there is no evidence before the court of their actual size apart from the statement that they were smaller than the later compressor.

I am satisfied that the bank intended to take out a new policy of insurance to cover the new compressor and failed to do so. I am equally satisfied that the bank failed to discover and/or to tell the plaintiff that the new compressor was too large to be covered if the motor burned out and that the plaintiff was misled by the assertion of the insurance officer of the bank to the extent that he did not consider he needed to look for alternative cover.

The plaintiff claims under three heads and I take each in turn.

The first is for the refund of the premiums paid for the cover after the motor burned out. I do not consider he can succeed on this. There is ample evidence that the premiums were paid to the insurance company and that there was a policy in existence. That did not simply cover the machine being in working order but covered it for loss from fire and earthquake at least. That cover continued whether it was working or not. The claim under the first head is dismissed.

The second head is a claim for the total loss of the compressor. As I have stated, that has been modified because the compressor has been repaired and is now in working condition. The plaintiff's evidence was that he had the motor from another compressor transferred to this machine. He gave the repairer one of his smaller compressors worth $500 in full satisfaction of the repair both in terms of labour and materials.

The insurance witness produced the claim form originally put in by this plaintiff. Attached to it was an estimate for the rewinding of the motor at a cost of $375.

It is also notable that, although this claim is for the total loss of the compressor "valued at $2,250 at the time of the damages to the compressor", the plaintiff's own claim form put the replacement value at that time at $1,500.

Such carelessness with regard to the value would have gone against the plaintiff even if I had found in his favour on this. However, I am satisfied that the compressor was repairable and has now been repaired. There is no evidence that the original repair would not have been successful if it had been carried out at the time. I allow the claim under this head in the sum of $375.00.

The final head is for loss of profit for the whole time the plaintiff has been unable to use his compressor - a period of two years and nine months. This is a head under which he should be entitled to damages but only if he proves to the satisfaction of the court that there was an actual loss and the amount.

The evidence of his earnings, however, is scant and confusing. There are no written accounts, no attempt was made to try and give actual figures, the only

figures given by the plaintiff were very clearly plucked largely from the air and were inexplicably inconsistent. No attempt was made to supply such essential information as the cost of extra labour when the larger compressor was working , the hours they worked, when and if they were laid off and the actual volume of work still possible with the smaller compressor.

Neither was any explanation given as to why the plaintiff had done nothing in the whole period claimed to mitigate his loss.

The burden is on the plaintiff to prove his claim and he fails under this head.

Finally the question of costs. The plaintiff has succeeded in the claim for liability but he has proved damages in a very much reduced sum from that claimed. Had he claimed only such a sum, I have little doubt the defendants would not have contested the action. In the circumstances, I consider each side should bear its own costs.

Thus the order is:

Judgment for the plaintiffs in the sum of $375.00 with no order for costs.

NUKU'ALOFA, 23 May 2000. **CHIEF JUSTICE**