
AUSTRALIAN AND NEW ZEALAND BANKING GROUP

Plaintiff

V

- 1. HUPETO KAITAPU**
- 2. 'AHOSIVI KAITAPU**
- 3. ANGUS NAUPOTO**

Defendants

BEFORE THE HON MR JUSTICE SHUSTER
MRS TUPOU FOR THE PLAINTIFF
MRS TAUFAETEAU - FOR THE DEFENDANTS
DATE OF HEARING 28th and 28th APRIL 2010
SUBMISSIONS 17th MAY 2010 AND 04 JUNE 2010
JUDGMENT DELIVERED 22ND JUNE 2010

JUDGMENT AND RULING

INTRODUCTION

This case concerns a request for summary judgment against the defendants - brought by the plaintiff Bank, a Body Corporate which carries on business throughout the Kingdom - as the ANZ Bank.

- A Statement of Claim was filed in the Supreme Court on 22nd December 2008.
- A Statement of Defence was filed in the Supreme Court on 25th February 2009.

The Plaintiff seeks judgment against the three defendants jointly and severable in respect of their default of payment for their housing loan - in the amount of \$112,186.74 plus interest, at 16.5% from 11th November 2008 - until paid together with costs of this action.

On the 16th March 2009 this case was first called in the Supreme Court the court agreed to adjourn the case as per our guidelines to see if an amicable settlement could be reached by the parties.

The case was further reviewed on the 1 May 2009 and again on the 18 May 2009.

On the 18th May 2009 the case was set for formal mediation to take place, with the consent of the parties. Mediation was set to take place before the Assistant Registrar on 09 June 2009 and then further adjourned to 16th July 2009.

Unfortunately the parties were unable or; they were unwilling to reach a formal settlement or agree to a consent order being made, and the parties requested a court hearing. A trial date was set and the matter proceeded to trial on the 28th and 29th April 2010 with written submissions to follow.

At the close of the defendant's case, the plaintiff sought to join Mr Angus Naupoto as the third defendant, because of his testimony. The application was granted, subject to informing the witness Mr Angus Naupoto of the court's intention and the case was adjourned to the 7th May 2010 for the third defendant to attend court – and to be informed of this application.

On the 7th May 2010 neither Mr Naupoto nor Mrs Taufaeteau appeared and so the court ordered Mr. Angus Naupoto to be joined - as the third defendant on hearing the plaintiff's formal application.

THE EVIDENCE

On the 28th April 2010 the court heard evidence from the plaintiff's witness, on oath. PW1 - MALIA FISILAU she produced relevant bank documents including statements which covered the period 5th January 2004 to 30th April 2009. The Court was told certain documentation had been destroyed by fire during the November riots.

The statements produced span a loan period of five-years and three months and they are detailed in pages 8-20 of the plaintiff bundle of documents - for an account no. 1402450 in the name of the defendant's HUPETO and "AHOSIVI KAITAPU c/o PO Box 1473 Nuku'alofa.

The witness told the court there were three separate letter's of offer, from the ANZ bank, addressed to the defendants and they were dated as follows:-

First ANZ offer dated 19-07-07 - pages 21-27 of the bundle

- This letter of offer indicated the ANZ Bank were prepared to loan the defendant borrowers a housing loan in the sum of 97,671 TOP for Home appliances and restructure of facility with a notional term of 18 years however debt to be fully cleared by 15 years. To be repaid at TOP 1,150 per month commencing August 2007. Interest rate was 12.5 per annum. There is a clause regarding the Bank's Indicated lending rate in the agreement. The agreement was signed on 20-07-07 by both borrowers.

Second ANZ offer dated 15-11-07 pages 28-34 of the bundle

- This letter of offer indicated the ANZ Bank were prepared to loan the defendant borrowers a housing loan in the sum of 101,945 TOP for restructuring of existing facility

with a notional term of 20 years however debt to be fully cleared by 15 years. To be repaid at TOP 1,200 per month commencing February 2008. Interest rate was 15.5 per annum. There is a clause regarding the Bank's Indicated lending rate in the agreement. The agreement was signed but not dated by HUPETO KAITAPU only

Third ANZ offer dated 08-02-08 pages 35-41 of the bundle

- This letter of offer indicated the ANZ Bank were prepared to loan the defendant borrowers a housing loan in the sum of 106,537 TOP to pay for the airfare of Hupeto Kaitapu to go to the USA with a maximum term of 15 years. To be repaid at TOP 1,450 per month commencing March 2008. Interest rate was 15.5 per annum. There is a clause regarding the Bank's Indicated lending rate in the agreement. The agreement was signed but not dated - by both borrowers.

On the 28th March 2007 the ANZ Bank sent a formal NOTICE OF DEMAND to both borrowers which they signed and acknowledged as receiving on the 28th March 2007.

There followed various items of correspondence between the parties dated 03 April 2007 06 February 2008, 06 July 2008 with a reply from ANZ dated 18 August 2008 followed by a final letter dated 28th August 2008 from the defendants to ANZ Bank

A Formal Notice of Demand was sent by the bank to the defendants dated 10th October 2008 demanding full payment of the debt of \$111,745.24 plus interest at 16.5% the record shows evidence that receipt of that document was acknowledged on the 14th October 2008

That Formal Notice of Demand was followed by a letter from the Banks Solicitors - dated 24th November 2008 demanding payment of \$112,186.74 plus interest at 16.5 % - as of 11th November 2008 from the defendants.

ANALYSIS

There was no dispute raised by the defendants in this trial - as to the default in payments to the ANZ Bank, or to the amount owed under the various agreements

Accordingly I find as a fact hearing the evidence that the sum of **\$112,186.74** is the quantity of debt due and owing to the plaintiff the ANZ Bank.

Further I find as a fact that the interest rate fixed - **is and was set at 16.5%**

At issue after trial appears to be the following – however these issues were not pleaded in the Defendant's Statement of Defence

- That the date of the first agreement of the defendants was the 19th December 2003 and not 5th January 2004 as pleaded in the Statement of Claim.
- That the parties to the first agreement did not include the first defendant but it was the second defendant and her brother Angus Naupoto now the third defendant.

- That the first defendant was added onto the loan agreement later when he eventually obtained employment
- That the plaintiff did not provide them with a loan agreement in the Tongan Language.

I agree with the plaintiff's submission that any minor amendments to the date - say from the 19th December 2003 to 5th January 2004 and the joining of the third defendant - **ARE NOT** sufficient to displace or discharge the defendant's liability for this debt.

There is clear relevant admissible evidence before this court that the defendants signed legal documents which have been produced in evidence before this court and that the defendant's obtained the loan of money, which they still owe - having defaulted in repayments as agreed to the plaintiff Bank. There was also clear evidence produced in court of default notices having been served upon the defendants

I agree with the plaintiff in their written submission that this case concerns a total debt due and owing to the plaintiff bank, and an application for summary judgment. The case does not centre upon "a mortgage."

Each of the defendants speaks English and they signed the documentation - in English there was no evidence given that they requested the bank to supply copies of documents in Tongan.

ACCORDINGLY

- In my respectful view the defendants were unable to establish **any defence** to this claim with the evidence they called.
- In my respectful view the plaintiff has proved its case against the defendants
- In this case Judgment is appropriate and is ordered entered against the defendants.
- The plaintiff is entitled to their costs:- to be taxed if not agreed



Shuster J
Judge of the Supreme Court