**IN THE SUPREME COURT OF SAMOA**
**HELD AT MULINUU**

BETWEEN:

**SULUAPE EMOSI**, of Sogi, Married Man

First Plaintiff

A N D:

**AIGA EMOSI**, of Sogi, Married Woman

Second Plaintiff

A N D:

**ANZ BANK (SAMOA) LIMITED**, a duly incorporated company carrying on the business of banking

Defendant

Counsel: Ruby Drake for the First and Second Plaintiffs
Matafeo G. Latu for the Defendant

Decision: 03 March 2023

**JUDGMENT OF THE COURT**

**Introduction.**

1. The claim by the plaintiffs, husband and wife, emanates from a sale of their land by the defendant bank to whom they mortgaged their land at Siusega to secure a loan they obtained, to build a residential house.
2. Subsequent to the filing of this action the first plaintiff passed away in December 2019. Clarke J granted leave to the second plaintiff as administrator of the estate of the first plaintiff to continue to represent his estate.
3. The first plaintiff was aged 89 years when he died. The second plaintiff was born on 10 September 1948. Neither of them had formal education; their education ended at primary school level.

**Background.**

1. In December 1984, the plaintiffs bought a quarter (¼) acre section of land at Siusega, near Apia as tenants in common, with monies won by the second plaintiff (wife) at a raffle. At the time the second plaintiff (husband) was employed as a carpenter. The husband commenced to construct a dwelling house on the land with the help of his sons after he had accumulated sufficient materials to commence construction.
2. In March 1999 they mortgaged their land to the defendant bank to secure a loan, arranged by their daughter to assist with the construction. Loan repayments were met by the daughter who subsequently left for overseas. The loan was finally paid off in 2004 but the mortgage was not discharged.
3. Before the plaintiffs’ loan was paid in full, their son Alenepi requested the plaintiffs to use their land as security for a loan he and his wife were intending to obtain from the defendant. The husband agreed but the wife flatly refused.
4. The son Alenepi and his wife Meaalofa obtained a loan under Meaalofa’s name in February 2004. A letter of approval dated 18th February 2004 addressed to Meaalofa states inter alia, the approval of $20,000 loan to purchase a taxi. It was for a term of two years. Under the heading securities it is simply stated: “As held”. The letter is unsigned but the name S. Lauano is typed as the author of the letter. It is a two page letter which requested the borrower, Meaalofa, to sign at the bottom, to acknowledge acceptance of the loan terms.
5. Accompanied by the son Alenepi, the bank officer S. Lauano went to the plaintiffs’ house with a form headed ‘Guarantee’, a nine page typewritten document, to be executed by the husband. It was signed by the husband but neither S. Lauano nor Alenepi signed as a witness. Neither was the certificate signed. The certificate required the witness to certify that the guarantor fully understood the true purport and effect of the guarantee and voluntarily executed the guaranteed.
6. On the backing sheet of the guarantee, the word “Replaced” is written.

**Second loan by Meaalofa.**

1. In October 2004 Alenepi and Meaalofa requested and obtained another loan of $13,000. A two page loan approval letter addressed to Meaalofa was acknowledged and accepted in writing by Meaalofa. Under the heading security is written: “Guarantee given by Father, Meaalofa Lee Lo.” The letter also encourages Meaalofa to seek independent legal advice. It is signed by Silia Lauano.
2. A deed of guarantee dated 20thOctober 2004 was signed by the husband and witnessed by S. Lauano but the certificate was not signed. On the back of the backing sheet is written the words: “Replaced”.

**Third loan by Alenepi and Meaalofa.**

1. In August 2006 a loan of $30,000 was approved taking the indebtedness of Meaalofa to $52,000. Again the loan was guaranteed by the husband by a deed of guarantee dated 30th August 2006 and witnessed by a bank officer but the certificate is again not executed.
2. **Fourth and Final loan to Alenepi and Meaalofa.**
3. By letter dated 15th May 2008 from the bank to Meaalofa, the bank offered approval of a further loan of $15,000, which together with previous advances takes the total amount owing to $54,437.
4. The letter of offer, unlike the previous letters of 2 pages is eleven (11) pages and signed by one Bernie Morton, Head of Business and Financial Services. Under the heading security the letter states:
	* Security (held)
	* Guarantee limited to $30,000 by Emosi Suluape supported by Registered First Mortgage over ¼ acre at Siusega.
	* (to be taken)
	* Guarantee limited to $52,000 by Emosi Suluape supported by Registered First Mortgage as in (a) above.

**The Bank’s Mortgagee Sale.**

1. Meaalofa the borrower lost her job and defaulted in her loan repayments. Default notices were sent and served by the bank on the borrower as well as both plaintiffs as mortgagors under the deed of mortgage of March 1999. The plaintiffs’ property was eventually sold for $130,000. By letter dated 18th March 2013, the solicitor for the defendant told the plaintiffs their mortgaged property had sold for $130,000 and the balance of $73,862.74 is available for them provided they vacate the property within 7 days.
2. The plaintiffs refused to vacate.

**Eviction Orders.**

1. In April 2013 the bank issued proceedings in the Supreme Court to evict the plaintiffs. In the absence of a response by the plaintiffs, default judgment was entered by formal proof in June 2013. The plaintiff husband then applied to set aside the judgment. The application was heard by Nelson J in November 2013. The application was refused.
2. At the outset of his ruling (page 2) Nelson J noted at paragraph 1:
	* “The mortgage in question was executed by the defendants (plaintiffs in these proceedings), on 01st March 1999 and defendants counsel advised at the outset of these proceedings the validity of the mortgage was not in question.”
3. Nelson J also noted the evidence of the bank officer Ane Fiu at paragraph 13:
	* “Ane Fiu’s evidence was that as recoveries officer for the plaintiff bank she was referred this file in November 2011. This was after the aborted mortgagee sale. She said she had a number of discussions with Meaalofa and her husband in an attempt to rectify the account. This included attempts at refinancing... She said payments were spasmodic and were not in accordance with assurances given...”

This evidence by Ane Fiu probably explains why the plaintiffs took no active steps when they received default notices from the bank. At their age and circumstances there was nothing they could do.

1. Nelson J also echoed at paragraph 29:
	* “I feel some sympathy for the two defendants who have lost their land because of a debt not belonging to them. A debt incurred by their son and daughter-in-law for which they put up their land as collateral.”
2. This comment by Nelson J is vital because in 2013 before the commencement of the plaintiffs claim, the bank was of the firm view that the joint mortgage by the plaintiffs in March 1999 was the security for the borrowers (Alenepi and Meaalofa) loan. With that firm belief it exercised its mortgagee’s right of sale and obtained the eviction order.

**The plaintiffs’ claim.**

1. By statement of claim dated 01st October 2015 the plaintiffs advanced five causes of action namely,
	* (a) Breach of statutory/fiduciary duties;
	* (b) Undue influence;
	* (c) Unjust enrichment;
	* (d) Discharge of Guarantee, and
	* (e) Illegal sale.
2. Solicitor for the plaintiffs in these proceedings was engaged after the 2013 eviction episode.

**Breach of Statutory Duty.**

1. The plaintiffs contended that subsequent to the sale of their property, the defendant unlawfully withheld the balance of $73,862.72 after deduction of the loan monies owing to the defendant bank.
2. Instead of paying the said balance to the plaintiffs, the defendant deducted further costs for the eviction orders it filed against the plaintiffs, as well as other costs incurred by the purchaser of the property who were unable to move into the property until the plaintiffs were evicted.
3. It is not disputed that the sum of $73,862.72 was available for the plaintiffs to collect after the sale of the property. A letter from the defendant’s solicitor was sent to the plaintiffs to vacate the property within 7 days and collect the funds.[[1]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn1) The plaintiffs did not vacate; neither did they attempt to collect the funds.
4. This cause of action fails.

**Undue Influence.**

1. The evidence is not in dispute. Alenepi requested his parents, the plaintiffs, to use their land as collateral for his loan. The wife refused but the husband agreed. There was no pressure brought onto the husband. With the approval of his father, Alenepi and wife applied for and obtained a loan approval. When the bank officer and Alenepi visited the plaintiffs’ home they took the security documents for the husband to sign.
2. Submissions by the plaintiffs’ counsel that the defendant by its officers demonstrated the defendant acted unconscionably in charging the last three advances against the plaintiffs land without the knowledge and consent of the plaintiff is not supported by the facts.
3. The evidence went no further than to establish a normal family relationship between father and son. A father who wanted to help his son with his taxi business.
4. No basis for any finding that the defendant bank could be said to have unconscionably exploited for its benefit any advantage which was or ought to have been known to it.[[2]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn2)
5. This cause of action also fails.

**Unjust Enrichment.**

1. In support of this cause of action the plaintiffs contended that the husband did not know nor consented to secure the second, third and fourth advances and therefore did not execute any deed of guarantee.
2. In her written submissions, counsel for the plaintiffs argued that the purported guarantees for the last three advances demonstrated a lack of fairness and consideration of the fact that the plaintiffs were uneducated and did not understand commercial matters.
3. The hurdles which the plaintiffs need to overcome is firstly when they signed the mortgage and guarantee for their loan in 1999 the mortgage document and guarantee was not adequately explained to them. Their solicitor, then, undoubtedly explained to them the legal implications of the documents particularly the bank’s right to foreclose in the event of repayment default. Secondly, the wife with obviously the consequences of repayment default in mind, flatly refused her son’s request. And thirdly, the requirement for the doctrine of unjust enrichment cannot be met by the facts and is probably the reason why counsel did not address it in her submissions.
4. This cause of action also fails.

**Discharge of Guarantee.**

1. Plaintiff contended that the husband’s guarantee for the first loan in February 2004, of $20,000 was discharged when the defendant varied the principal contract by granting three additional loans without the knowledge and consent of the husband.
2. The allegations are not supported by the facts. The husband’s guarantees for the first two loans in February and October 2004 were replaced and discharged. The last two loans in 2006 and 2008 were guaranteed by the husband’s two separate deeds of guarantee. When the husband discovered that Alenepi and wife were about to move overseas he requested the defendant to issue a stop notice. He obviously knew the consequences if both borrowers leave before the loan is paid off.

**Illegal Sale.**

1. The wife, the joint owner of the property as a tenant in common refused to use her share, and interest as collateral for the loans, and this fact was known to the defendant bank in 2004 when the first loan to Alenepi and wife was granted.
2. The bank conceded. It did submit however that it did not use the wife’s interest in the property as security. The only interest that was used was that of the husband.[[3]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn3) But then the submission continued to reason and justify the forced sale:
	* “...it follows that, it was only the first plaintiff’s interest that was sold when the defendant sold the property in 2014 and not the interest of the second plaintiff. As the interest of the first plaintiff is that of the co-owner as a tenant in common with an individual share in the property, it would not be possible for the defendant to sell his share without selling the property as a whole with the share of the second plaintiff returned to her following the sale...”
3. Argument by the defendant defies logic, defies the characteristics of tenancy in common, and defies common sense.
4. The wife was deprived of her interest in the land she jointly owned as a tenant in common yet the defendant insists it is only the husband’s individual half share which it sold. Her interest and share as a tenant in common is in the freehold estate which was lost when the defendant sold the land. Her half share undivided interest can only be alienated with her consent, or by Court order and due process of law. The defendant had no right to convert her share in the freehold estate into cash.
5. Unlike other jurisdictions, Samoa does not provide for partition orders in its Property Law legislations. Jurisdictions which do provide for partition orders require the approval of the Court to grant partition orders or a sale, in lieu. One of the essential features of a tenant in common at common law, is that the other co-tenant or any other person could not compel a co-tenant to sell the land. The High Court of Australia in *Nullagine Investment Pty Ltd v the Western Australian Club Inc.**[[4]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn4)* which dealt with an appeal from the Supreme Court of Western Australia concerning dispute between tenants in common, and an application for partition dealt briefly with the history of partition legislations. On the issue of the interests and shares of tenants in common it is stated at page 656:
	* “Indeed any essential feature of the interest or share of a tenant in common, and a condition precedent of its existence or survival is that the tenant in common does not own the freehold estate and is unable alone to deal with the land. It is that very distinction between the interest or share of a joint tenant or tenant in common and the freehold estate which underlies the enactment of long series of partition statutes directed towards facilitating or enabling a joint tenant or tenant in common to obtain an effective order for the partition or sale of the land itself.”
6. Even if the first plaintiff did mortgage his undivided half share as security for his son’s loans, the bank, in the event of default can only exercise its mortgagees right against the half share of the husband but not the wife’s. With many years in the banking business, the response by the defendant and the reasons for the sale was unbelievably very surprising.

**Joint mortgage by the plaintiffs.**

1. When the defendant bank exercised its mortgagees right to foreclose, the joint mortgage in 1999 by the plaintiffs was the basis for the foreclosure proceeding.
2. When Alenepi and wife sought and obtained the four separate advances from the bank, the security which the bank accepted was: “As held”, which again referred to the joint mortgage by the plaintiffs as there was no other security held by the bank. References to the security “As held” when the first loan was granted was obviously a mistake or oversight, which permeated throughout to when the last loan in 2008 was given.
3. When the defendant initiated eviction proceedings against the plaintiffs to evict them from the land, the defendants relied on the joint mortgage.

**Undivided half share of first plaintiff.**

1. It was only when these proceedings were commenced that the undivided half share of the first plaintiff as security emerged. A mortgage of the undivided half share of the first plaintiff if executed and registered would have alerted the Registrar of the Courts when the application for mortgagees sale was filed that the impending forced sale of the whole of the land was not proper. Of if the sale did proceed and the land is sold, the Registrar of lands, upon the presentation of the conveyance for registration, would or should recognise the discrepancy.
2. The illegal sale cause of action succeeds and the plaintiffs are entitled to damages.

**Damages.**

1. On the issue of damages, the Court unfortunately did not have the benefit of comprehensive detailed submissions from counsels, particularly counsel for the plaintiffs. At pages 13 and 14 of her written submissions counsel for the plaintiffs repetitively reiterated the emotional, physical and psychological toll which the defendant’s high handed conduct has had upon the wife. She then submitted at page 14:
	* “We respectfully submit that the second plaintiff be fully compensated for her losses including her current health and mental wellbeing.
	* We submit that the Court must give full compensation to the second plaintiff for the contumelious disregard of her legal rights.”
2. In fairness to the plaintiffs the Court will consider the issue of damages under the normal headings of special, general and exemplary. There is sufficient information before the Court to make the determination.

**Special damage.**

1. Under this heading the obvious issue is the value of the land and of the building. Two valuation reports were tendered. Differences in values submitted in the reports are not significant. As to the value of the land the defendant’s valuation report estimated a value of $91,000; whereas the other report placed it at $85,000. The Court will accept the value of $91,000 as submitted by the defendant.
2. As to the value of the building the defendant’s value is $40,000, whereas the plaintiffs’ value is $137,000. But the $137,000 value as the report clearly state is the replacement value, that is the cost to rebuild the same building in 2012, the time of the valuation. On the other hand the $40,000 valuation reflects the market value of the building on the open market at the time of the valuation (14/04/2011). The Court accepts the value of $40,000.
3. The sum of $131,000 is awarded under this heading of special damage. The sum of $73,862.72 withheld by the defendant is to be added taking the award to $204,862.72.

**General Damages.**

1. The amount awarded under special damage is far too inadequate for the wife to purchase another quarter acre land and to rebuild a shelter. General damages is warranted to enable the wife to purchase land and to assist in building a home.
2. It is commonly accepted that the price of land appreciates yearly at 10%. Likewise, due to inflation, prices of building materials also increase, if not sky rocketed. It was the defendant’s irresponsible and high minded conduct which forced the wife into the situation she is in now. It would not be unreasonable to say that the current price of land now stands at about $150,000 per quarter acre. With that estimate the sum of $60,000 is awarded.
3. I accept from the valuation report referred to in paragraph 52 above that the replacement value of the plaintiffs’ house was $137,000 in 2012. That figure has to be adjusted upwards due to inflation. I will increase the valuation by 25% which comes to $161,250. The amount of $161,250 is also awarded as part of the general damages.
4. For general damages the sum of $221,250 is awarded.

**Exemplary Damages.**

1. Undoubtedly the plaintiffs suffered distress, inconvenience, anxiety, hardship and emotionally drained when they lost their home in 2013. The husband was then 83 and the wife 65. When the husband defied the Court order to vacate his home, he was taken away by police and spent the weekend in a police cell. After his death there was no place for the wife to bury him. He is temporarily buried at his brother’s place. After the eviction the wife found refuge with relatives living as squatters on Government swampy land at Sogi. She has been hospitalised several times due to the mental distress and anxieties.
2. Both Aggravated and Exemplary damages may be awarded in an action for tort. The principles justifying the award are set out in *OF Nelson Properties Ltd v Feti*.[[5]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn5)
3. Instead of taking appropriate measure to ameliorate the suffering of the plaintiffs, particularly the wife since the passing away of the husband, the defendant in high minded fashion continued to attempt to justify its illegal and unlawful conduct. I determine this an aggravating factor.
4. Experience suggests that juries in civil cases often determine damages by reference to their everyday lives and knowledge. In that way damages can be brought in line with community expectations.[[6]](http://www.paclii.org/ws/cases/WSSC/2023/8.html%22%20%5Cl%20%22fn6) Our society will not condone bully tactics by financial institutions against the underprivileged.
5. An award of exemplary damages is justified and is assessed at $200,000.
6. Judgment accordingly for the plaintiffs as follows:
	* (i) Special Damages - $204,862.72.
	* (ii) General Damages - $221,250.
	* (iii) Exemplary Damages - $200,000.
7. Defendant to pay the plaintiffs costs on the indemnity basis.