

IN THE HIGH COURT OF AMERICAN SAMOA
APPELLATE DIVISION

HIGH COURT OF AMERICAN SAMOA
Clerk's Office
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Terry S. Fielding
CLERK OF COURTS

METRO SAMOA, INC.,) AP No. 10-09
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 Appellant,))
))
v.) OPINION AND ORDER
))
BINACO TEXTILES, LTD.,))
))
 Appellee.))
))
_____))

Before KRUSE, Chief Justice, WARD, Associate Justice, PATEA,*
Acting Associate Justice, FA'AMAUSILI, Associate Judge, and
SATELE, Associate Judge.

Counsel: For Appellant, Marshal L. Ashley
 For Appellee, Charles V. Ala'ilima

WARD, Associate Justice

BACKGROUND

Appellee Binaco Textiles, Ltd. ("Binaco") is a wholesale exporter based in Fiji. In 1997, Binaco began a working-relationship with Appellant Metro Samoa, Inc.¹ ("Metro"), supplying Metro with clothing and fabric. Binaco shipped goods to Metro "on open documents," payment due within 60 to 90 days. Sometime in June 2007, Metro stopped making payments on its open account numbers AS115 and AS139. Account number AS115 included transactions from November 2000 until February 2006 and had an outstanding principal balance of \$299,109.50. Account number

* The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

¹ Metro Samoa, Inc. is also known as Makro Samoa, Inc.

AS139 had an outstanding principal balance of \$42,553.91 for transactions occurring during the period of September 2003 through October 2005. An August 23, 2007 letter from Binaco's attorney advised Metro that Binaco would file suit if Metro did not make arrangements for payment. Ultimately, Binaco sued Metro for outstanding balances on account numbers AS115 and AS139, and, by the time of trial, charged Metro 12 percent interest (an interest rate commonly used between merchants in Binaco's native Fiji).

Trial commenced on November 3, 2008. On February 18, 2009, the Trial Division found in favor of Binaco, finding that Binaco's shipments of goods followed by mailed invoices served to create valid contracts between the parties. *Binaco Textiles, Ltd. v. Metro Samoa, Inc.*, CA No. 100-07 slip op. at 3 (Trial Div. Feb. 18, 2009). The Trial Division then addressed interest, referring to and citing the following four elements of common law usury: a loan or forbearance; an understanding between the parties that the principal is repayable absolutely; the exaction of a greater profit than is allowed by law; and an intention to violate the law. *Id.* at 4 (citing *Abbot v. Stevens*, 133 Cal. App. 2d 242 (2d Dist. 1955)). Without further delving into local law, the Trial Division found that the record lacked evidence of Binaco's *usurious intent*, noting that Binaco's invoices provided "interest charged on all overdue accounts," but did not include a *usurious rate*. *Id.* The Trial Division concluded that the "agreements were not *usurious*, thus debt forfeiture is not

required." *Id.* The Trial Division next found that Binaco did not qualify as an open-end creditor under A.S.C.A. § 28.1505, under which Binaco could have sought 12 percent interest. Instead, the Trial Division found that A.S.C.A. § 28.1501(a) (with its 6 percent interest provision) applied. Consequently, the Trial Division entered judgment in Binaco's favor in the principal amount of \$341,663.41, plus pre- and post-judgment interest on the principal amount at 6 percent per year, and court costs.

After the Trial Division's February 18, 2009 Order ruling in favor of Binaco, Metro filed its Motion for Reconsideration on February 27, 2009; the Trial Division denied the same on November 18, 2009. Subsequently, Metro filed its Notice of Appeal on November 27, 2009.

Metro's appeal challenges the Trial Division's findings and conclusions in connection with usury. Metro's sole contention is that Binaco violated American Samoa's usury laws and must, as a result, forfeit Metro's debt.

This appeal was properly before us in accordance with the requirements of A.S.C.A. § 43.0802.

STANDARD OF REVIEW

The Appellate Division of the High Court reviews questions of law *de novo*. *Roman Catholic Diocese of Pago Pago v. Avegalio*, 20 A.S.R.2d 70, 73 (App. Div. 1992). In the judicial appeals context, *de novo* review acknowledges an appellate court owes no formal adherence or deference to the reasoning or conclusions of

law a lower court proffers; indeed, *de novo* review allows the appellate court to entertain and determine an issue of law anew. See *Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991).

With far more deference, the Appellate Division reviews findings of fact under the "clearly erroneous" standard. A.S.C.A. § 43.0801(b). A finding of fact is erroneous when the entire record produced the definite and firm conviction that the court below committed a mistake, according particular weight to the trial judge's assessment of conflicting and ambiguous facts." *TCW Special Credits v. K/V Kassandra Z*, 7 A.S.R.3d 3, 7 (App. Div. 2003). (internal quotations omitted).

DISCUSSION

I. Usury

The lone issue Metro raises on appeal is whether or not the lower court erred by ignoring other *persuasive* (not controlling) territorial caselaw precedent, which previously applied the criminal usury penalty of forfeiture on a lender who had not been convicted of usury. We answer that question quickly in the negative. Previous lower courts have misconstrued A.S.C.A. § 28.1510² as capable of providing the penalty of forfeiture in

² A.S.C.A. § 28.1510 follows in its entirety:

Any person who loans money or extends credit in any manner whatsoever and takes, receives, reserves, or assesses interest, fees, or minimum charges thereon at a rate higher than that allowed by law *shall upon conviction* be sentenced as for a class A misdemeanor; *and in addition, shall forfeit* to the debtor the full amount of the debt or obligation upon which the unlawful interest, fee, or minimum was charged.

situations devoid of a usury conviction. *Cf. Sundarjee Bros. Ltd. v. Metro Enterprises*, CA No. 79-07, slip op. at 3-5 (Trial Div. Nov. 16, 2007) (order granting summary judgment); *Shantilal Bros Ltd. v. Samoa Miscellaneous, Inc.*, 29 A.S.R.2d 207, 212 (Trial Div. 1996); *Shantilal Bros. Ltd. v. K.M.S.T. Wholesales, Inc.*, 9 A.S.R.2d 62, 65 (Trial Div. 1988). The language of A.S.C.A. § 28.1510 is clear and we accordingly overrule those previous decisions summarily, soundly holding in it stead the following: a lender alleged to have committed the crime of usury for a specific loan will forfeit that specific loan *only* after the lender's criminal conviction of usury for that specific loan under A.S.C.A. § 28.1510. Procedurally, we also acknowledge that the lower court's ruling incorrectly relied on common law usury, which the Legislature preempted by passing A.S.C.A. § 28.1510; common law usury therefore has no application in any action within this territory while A.S.C.A. § 28.1510 exists. *Cf. A.S.C.A. § 1.0201(4)*

II. Business Loans

This false issue of usury actually veils the real issue: whether or not Binaco's 12 percent interest rate is legal within this territory. This second issue requires us to outline the statutory history of usury and financial loans in this territory. We ultimately decide that we must remand this case to discover if Binaco's 12 percent rate should be given effect, which we hold appropriate under the auspices of A.S.C.A. § 28.1503.

Id. (emphasis added).

Canons of statutory interpretation require the judiciary assume the legislature intended to enact an effective law, *Am. Samoa Gov't v. Alo*, 2 A.S.R.3d 91, 92 (Trial Div. 1998), that statutes be read in harmony with one another when possible, *Gov't of Am. Samoa v. Bird*, 2 A.S.R. 102, 104 (Trial Div. 1940), and that a statute enacted later in time is more controlling than earlier statutes, see *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (citing *U.S. v. Fausto*, 484 U.S. 439, 453 (1988)); see also *Ferstle v. American Samoa Government*, 4 A.S.R.2d 160, 163 (Trial Div. 1987).

The *Fono* originally enacted P.L. 7-23 in 1962. Subsequently, the *Fono* reorganized P.L. 7-23, as amended, and recodified the same into the American Samoa Code, 1973 edition, placing the "Commerce and Trade" statutes concerning "Interest Rates" in its own chapter (Title 12, chapter 3) of the American Samoa Code. That chapter articulated the legal interest rate, 12 A.S.C. § 201, small loans interest rate, 12 A.S.C. § 202, limit on the sale price of goods, 12 A.S.C. § 203, and the penalty for usury, 12 A.S.C. § 204, within the borders of this territory. All of these statutes fit harmoniously together in one encapsulated chapter. However, in 1981, the American Samoa Code Annotated, with its new numbering system came into effect. P.L. 16-83 § 3 (1980).

Whereas in the American Samoa Code, "Commerce and Trade" provisions existed together in Title 12, in the American Samoa Code Annotated, the Legislature saw fit to separate these once

coexisting concepts in twain: Title 27, entitled "Commerce," and Title 28, entitled "Finance." This delineation separated the following: 12 A.S.C. § 203 was recodified as A.S.C.A. § 27.1501, and 12 A.S.C. § 201 became A.S.C.A. § 28.1501.³ Those two placements, in Title 27, chapter 15 ("Commercial Code"), and Title 28, chapter 15 ("Loans"), show the relation between those two chapters; both originate from the same source.

Consequently, this action implicates both Titles 27 and 28 of the American Samoa Code Annotated. Piecemeal additions to the American Samoa Code Annotated since, without any internal referencing, have further obscured that connection. See e.g. A.S.C.A. §§ 27.1530-27.1532; A.S.C.A. §§ 28.1501(c), 28.1503, 28.1505. Nevertheless, we are bound by the statutes before us and note that Title 27, chapter 15, and Title 28, chapter 15, of the American Samoan Code Annotated are interrelated. Accordingly, we must effectuate both chapters in as close to a state of harmony as is possible, especially in a situation (as here) of a merchant-to-merchant open account agreement. See *Bird*, 2 A.S.R. at 104.

Acknowledging the association between the two chapters, we must evaluate the business contract, the basis of this action, in a manner that effectuates both chapters. Accordingly, we hold that a contract for the sale of goods worth \$500.00 or more, must

³ With the exception of 12 A.S.C. § 203, P.L. 16-83 § 3 took the statutes kept in Title 12, chapter 3, of the American Samoa Code and recodified the same in Title 28, chapter 15, of the newly minted American Samoa Code Annotated.

be in writing, A.S.C.A. § 27.1530, or formalized as contemplated in A.S.C.A. § 27.1531 and A.S.C.A. § 27.1532. Furthermore, a business that sells goods by an open account method (as Binaco did here with Metro) can charge interest "loan" rates pursuant to A.S.C.A. § 28.1503.⁴

Business loan rates, like contracts, as between merchants, need not be in writing. The *Fono* has added to the American Samoa Code Annotated through the years; nevertheless, A.S.C.A. § 28.1501(a) has remained relatively unchanged since its inception in the 1960s:

Except as provided in this title, no person may charge more than 15 percent per year as interest on a debt or obligation, and no agreement to pay a rate of interest higher than 6 percent per year shall be enforceable unless the same is in writing and is signed by the party to be charged.

A.S.C.A. § 28.1501(a). In 2004, the *Fono* added A.S.C.A. § 28.1501(c), which maintains that Banks conducting business in American Samoa are

empowered to *charge, contract for, and receive interest* on loans at a rate up to 24% per year, provided that (a) The principal amount of the loan is \$5,000.00 or less, and (2) The principal amount of the loan and interest rate are disclosed in *written agreement that is signed by the parties to be charged.*

Id. (emphasis added). A.S.C.A. § 28.1501(c) requires a written agreement, but clearly allows for more than the fifteen percent contemplated under A.S.C.A. § 28.1501(a), to wit, a 24 percent rate. A.S.C.A. § 28.1501(c) is clearly an exception to A.S.C.A.

⁴ Binaco's "loan" cannot implicate A.S.C.A. § 28.1505, as that statute is reserved for credit card companies.

§ 28.1501(a) in that it exceeds the 15 percent rate, but an exception that requires an agreement signed in writing. Compare this writing requirement with A.S.C.A. § 28.1503, where the *Fono* authorizes businesses to "*charge, contract for, and receive any rate or amount of interest or other compensation, not to exceed 18 percent annually, with respect to any loan to any business or commercial organization . . . if the loan is transacted solely for the purpose of carrying on or acquiring a business or commercial investment.*" *Id.* (emphasis added). The "written agreement that is signed" language in A.S.C.A. § 28.1501(c) is conspicuously missing from A.S.C.A. § 28.1503. We assume the *Fono* intentionally maintained this omission for a writing requirement, at least in regard to A.S.C.A. § 28.1503. Moreover, like A.S.C.A. § 28.1501(c), the 18 percent interest rate for business loans is above the 15 percent amount called for by A.S.C.A. § 28.1501(a). Consequently, when A.S.C.A. § 28.1501(a) supplies, "Except as otherwise provided in this chapter . . .", that exception language *exempts* business loans (A.S.C.A. § 28.1503) from being subject to the writing requirement mandated by A.S.C.A. § 28.1501(a).

Essentially, a merchant-to-merchant open credit agreement that qualifies as a contract under A.S.C.A. §§ 27.1530-27.1532 allows the seller/lender to "charge, contract for, and receive . . . interest or other compensation" up to 18 percent on the open credit agreement ("business loan"/contract) pursuant to A.S.C.A. § 28.1503 (absent contract provisions or timely written notices

of objection to the contrary).⁵

With this holding in mind and acknowledging that Metro never contested that Binaco and Metro had formed an A.S.C.A. § 27.1531 contract under the open accounts of AS115 and AS139, we hold that a contract did indeed form between Metro and Binaco for those two accounts. Insofar as the lower court ruled the same, we affirm as much. Moreover, Binaco's 12 percent rate is not usurious as it is clearly within the rate prescribed by A.S.C.A. § 28.1503. We remand this case for further proceedings consistent with our holding. On remand, the lower court shall determine, as between merchants, whether the 12 percent interest rate Binaco lawfully charged (pursuant to A.S.C.A. § 28.1503) on the principal balances of accounts AS115 and AS 139 resulted in an enforceable contract for that interest rate pursuant to A.S.C.A. §§ 27.1530-27.1532 (merchant-to-merchant "agreements").

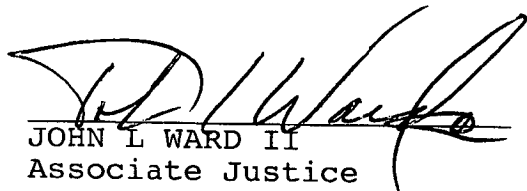
It is so ordered.

Dated: 3/19/12

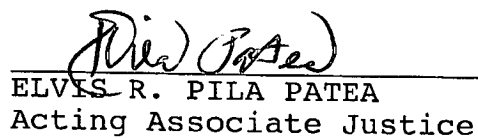
⁵ As the facts of this case, and trial court case-law, illustrate, these code-sections often form a trap for the unwary. See, e.g., *Sundarjee Bros. Ltd.*, CA No. 79-07 at 3-5; *Shantilal Bros. Ltd.*, 29 A.S.R.2d at 212. Simply revising the code-section-headings language to more clearly identify the code-section's application, (e.g., "Interest Rates for Loans to Individuals" for A.S.C.A. § 28.1501, "Business Loans and Commercial Financing" for A.S.C.A. § 28.1503, or "Credit Card Debt Interest Limits" for A.S.C.A. § 28.1505) would reduce the likelihood of their misapplication. Should the Legislature decide to revisit and revise these sections in the future, moving A.S.C.A. § 28.1510 to the "Criminal Justice" Title (Title 46) might also add more clarity.



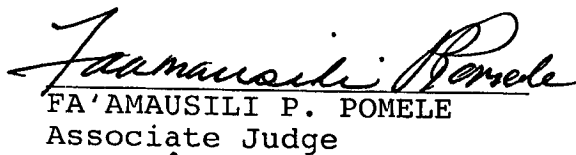
F. MICHAEL KRUSE
Chief Justice



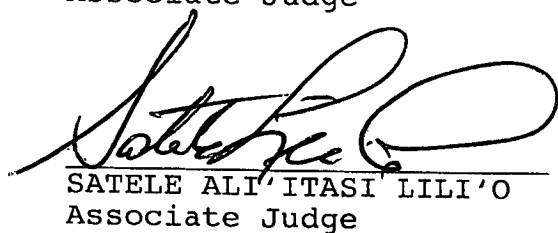
JOHN L. WARD II
Associate Justice



ELVIS R. PILA PATEA
Acting Associate Justice



FA'AMAUSILI P. POMELE
Associate Judge



SATELE ALI'ITASI LILI'O
Associate Judge

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