***** NOT FOR PUBLICATION *****

NO. 24700

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

BERT S. TOKAIRIN, individually and on behalf of all other stockholders in Nuuanu Onsen, Inc.; HAROLD YAMADA, individually and on behalf of all other stockholders in Nuuanu Onsen, Inc.; and MICHAEL HIRASA, administrator of the Estate of Haruko Hirasa, deceased, individually and on behalf of all other stockholders in Nuuanu Onsen, Inc., Plaintiffs-Appellees,

vs.

DOROTHY FUMIKO KAMEDA, aka DOT KAMEDA, aka FUMIKO KAMEDA; ROLAND KATSUNORI TOKAIRIN, aka KATS TOKAIRIN, aka KATSUNORI TOKAIRIN; JANET ETSUKO TOKITA, aka JANET ITSUKO TOKITA; DAVID KAMEDA, aka TOSHI KAMEDA; KATHERINE SAKUDA; GEORGE TOKITA; REIKO M. MATSUURA, personal representative of the Estate of Shigeo Matsuura, deceased; and MARION ISHIMOTO, Defendants-Appellants,

and

NUUANU ONSEN, INC., a Hawai'i corporation; JOHN AND MARY DOES 1-20; and DOE CORPORATIONS, PARTNERSHIPS, AND OTHER ENTITIES 1-20, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 96-3689)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Acoba, JJ., and Circuit Judge Wong, in place of Duffy, J., recused)

The defendants-appellants Dorothy Kameda, Roland Tokairin, Janet Tokita, David Kameda, Katherine Sakuda, George Tokita, Reiko Matsuura, and Marion Ishimoto [hereinafter, collectively, "the Appellants"] appeal from the August 6, 2001 order of the first circuit court, the Honorable Dan T. Kochi presiding, ruling "that Exhibit B of the settlement and mutual release agreement" [hereinafter, "the agreement"], entered into among the Appellants and the plaintiffs-appellees Bert S.

Tokairin, Harold Yamada, and Michael Hirasa [hereinafter, collectively, "the Appellees"], "shall include the total sum of $123,928.26." On appeal the Appellants contend that the circuit court erred in (1) "fail[ing] to include properly payable loans to . . . Dorothy . . . for the time period before January 1, 1997, in the amount of $175,124.60," and (2) "denying [the Appellants'] October 24, 2001 'Motion for Reconsideration or for Clarification of the [circuit court's August 6, 2001 order]'". We believe that the material terms of the agreement are facially ambiguous and that the Appellants' interpretation of extrinsic evidence of the parties' intentions is unavailing. Moreover, we believe that, of the two arguable constructions of the disputed contractual language, the one advanced by the Appellants is irrational, improbable, and inequitable, while the Appellees' construction is "fair, rational and probable." See Amfac, Inc. v. Waikiki Beachcomber, 74 Haw. 85, 110, 839 P.2d 10, 25 (1992). Nevertheless, we agree with the Appellants that the language of the circuit court's August 6, 2001 order is impermissibly ambiguous. Accordingly, we vacate the circuit court's August 6, 2001 order and remand for entry of a clear order consistent with this opinion.

I. BACKGROUND

The present matter arose out of a shareholder derivative suit filed by the Appellees on September 9, 1996

against, inter alia, the Appellants.[1] It is undisputed that Dorothy made personal loans to Nuuanu Onsen, Inc. (NOI) (a corporation that had operated a Nu'uanu Valley teahouse since August 23, 1968), some before and some after January 1, 1997. In their first amended complaint, the Appellees alleged that Dorothy, Roland, Janet, and David, on behalf of NOI, as its directors, (1) breached their fiduciary duty to NOI's owners, (2) managed negligently, (3) were unjustly enriched, (4) and converted the Appellees' property by: (a) selling Dorothy an empty lot for a price that was approximately $200,000 less than its fair market value of approximately $275,000; and (b) "[i]n or about 1994, without notifying the shareholders, having a stockholders' meeting, or . . . voting on the sale of corporate assets, . . . conspir[ing] to sell NOI's only remaining asset and use part of the proceeds to satisfy" debts arising out of Dorothy's personal loans to NOI. Apparently, in September 1998, the parties agreed to settle.[2]

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[1] On August 20, 1998, the circuit court partially granted summary judgment in favor of Dorothy, Roland, Janet, and David, thereby dismissing Bert's claims.

[2] Notwithstanding the parties' citations to their own briefs' appendices, the record on appeal does not properly circumscribe which version(s) of any agreement is/are controlling. Neither the circuit court's August 6, 2001 order or oral rulings nor the parties' written memoranda clearly identify a particular version as binding. For purposes of this appeal, the circuit court and the parties seem to have acknowledged during the circuit court proceedings that a draft of the relevant language prepared by the Appellees is printed in Exhibit 8, attached to the Appellants' motion to enforce settlement, and Exhibit F, attached to the Appellees' memorandum in opposition; and that a later red-lined draft was prepared by the Appellees' lawyer, Wendy Utsumi, which reflects no changes to paragraph 2.a(2) and (4). Moreover, the versions affixed as appendices to the Appellants' opening brief and the Appellees' answering brief are textually identical to each other and to Utsumi's red-lined draft. Consequently, we presume that paragraph 2.a(2)

(continued...)

On December 6, 2000, the Appellants filed a motion to enforce the settlement. On January 3, 2001, the Appellees filed their memorandum in opposition thereto. On January 16, 2001, the circuit court conducted a hearing and orally ruled as follows:

> I think the three crucial documents are . . . the . . . agreement that was prepared by [the Appellees] in the first instance; the September 15, 1998 letter by . . . [mediator Louis L. C.] Chang; and . . . the red line copy prepared by [Wendy] Utsumi[, see supra note 2].
>
> . . . If you look at [paragraph 2.a(2) of the Appellees' draft, see supra note 2], it states:
>
> > Establishment of a fund. . . . [U]pon closing of the sale of the NOI real estate assets . . . an account will be established in the books of NOI in the . . . amount . . . of $275,000, minus $75,000, and minus 80 percent of the loans payable to [Dorothy through 1996]. The account will be funded by Dorothy . . . from her distributor's share of NOI upon its dissolution.
>
> And if you look at paragraph [2.a(4)], it says:
>
> . . . [A]ll NOI loans properly payable to Dorothy . . . shall be paid to her upon dissolution, notwithstanding the establishment of the settlement fund.
>
> . . . .
>
> Then if we go to . . . Chang's letter, he requested . . . that the 80 percent formula be made into actual dollars based upon the 1996 loan amounts. . . .
>
> And also, that . . . the additional loans after . . . 1996 . . . be placed in an Exhibit B. . . . And he goes on to say that he expects that those amounts will be shortly agreed upon by the parties.
>
> So in essence, there was a settlement with regard to the claims and the loan amounts split up between prior [to] 1997 and after January 1, 1997.
>
> Then if we go to . . . Utsumi's red line copy, . . . there was an amount established as to the amount of loan[s]

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[2](...continued)
and (4), as printed in Utsumi's draft and attached to the briefs on appeal, controls, providing as follows:

> (2) Establishment of the Fund. . . . [A]n account will be established on the books of NOI in the following amount: the sum of $275,000 minus $75,000 and minus $140,099.68. The account will be funded by Dorothy . . . . . .
>
> (4) All NOI loans properly payable to Dorothy . . . as set forth in Exhibit "B" attached hereto shall be paid to her . . . , notwithstanding the establishment of the Settlement Fund.

> effective [at] the end of [1996]. And if you do the math . . . you come out to $175,124.60 as the loans that were made up [through 1996].
>
> . . . With regard to Exhibit B, . . . there was not an established amount . . . . And that was to be . . . worked out by the parties, which is consistent with the original offer . . . .
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> . . . So all we have today is the issue of the . . . amount of the loans which would be . . . payable to [Dorothy] after . . . 1996.

(Emphases added.) In its February 23, 2001 order, the circuit court granted the Appellants' motion but reserved the amount of post-1996 loans for later adjudication:

> (2) All of the loans . . . before [1997] were addressed under paragraph 2.a[](2) . . . ;
>
> (3) Under paragraph 2.a[](2) . . . the amount of the loans effective at the end of . . . 1996[] was discounted to $140,099.68;
>
> (4) Paragraph 2.a[](4) . . . addressed the loans . . . after . . . 1996;
>
> (5) Paragraph 2.a[](4) . . . provides that the amount of the loans subsequent to . . . 1996 . . . would be . . . placed on Exhibit B; and
>
> (6) The parties have not yet established the amount of the loans subsequent to . . . [1996] that are to be included in Exhibit B . . . .
>
> Therefore, it is hereby ordered, adjudged and decreed that . . . :
>
> A. . . . [T]he loans . . . before . . . 1997 shall be discounted to the sum of $140,099.68, and credited against the sum of $200,000.00 to create the Settlement Fund as set forth in [paragraph 2.a(2)];
>
> B. . . . [T]he properly proven Loans . . . which were made after [1996] shall be listed on Exhibit B . . . ; and when the amount of these loans has been established and placed in Exhibit B, there shall be a global settlement[.]

(Capitalization altered.) At an April 20, 2001 status conference, the parties agreed to submit additional evidence of the amount of the post-1996 loans, which they did.

On July 18, 2001, the circuit court held a hearing to resolve the amount of post-1996 loans. The circuit court found that "Exhibit B should include a total of $123,928.36. . . . [O]ne particular item . . . which occurred in . . . 1996, it may have been missed, but the . . . agreement indicates that

everything was settled up to the end of . . . 1996, . . . and therefore the [circuit c]ourt is also excluding that amount." The Appellants' counsel, Lyle Hosoda, asked for clarification as follows:

> . . . HOSODA: . . . What we're talking about . . . is paragraph 2[.a](4), and Your Honor just gave us the precise figure that you're ruling on for today, but that figure would be added to the amount that was already ruled upon . . . up through December 31st, 1997 [sic]?
> THE COURT: $140,000, something like that.
> . . . HOSODA: Right, it would be added. [T]he $123,000 would be added to that amount?
> THE COURT: That's correct.

The circuit court ruled in its August 6, 2001 order "that Exhibit B of the . . . [a]greement shall include the total sum of $123,928.26." (Emphasis added.)

On August 14, 2001, the Appellants filed a motion for reconsideration or clarification of the circuit court's August 6, 2001 order. On October 24, 2001, the circuit court denied the Appellants' motion. On November 20, 2001, the Appellants timely filed their notice of appeal to this court.

II. STANDARDS OF REVIEW

A. Appellate Jurisdiction

> [I]t is axiomatic that we are "under an obligation to ensure that [we have] jurisdiction to hear and determine each case and to dismiss an appeal on [our] own motion where [we] conclude [we] lack[] jurisdiction." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 73, 549 P.2d 1147, 1148 (1976). "When we perceive a jurisdictional defect in an appeal, we must, sua sponte, dismiss that appeal." Familian N[.W.], Inc. v. Cent[.] Pac. Boiler & Piping, Ltd., 68 Haw. 368, 369, 714 P.2d 936, 937 (1986) . . . .

Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986).

B. Construction Of A Settlement Agreement

A settlement agreement is in the nature of a contract. Standard Mgmt., Inc. v. Kekona, 99 Hawai'i 125, 133, 53 P.3d 264, 272 (App. 2001); see also Amantiad v. Odum, 90 Hawai'i 152, 162, 977 P.2d 160, 170 (1999). "'As a general rule, the construction and legal effect to be given a contract is a [conclusion] of law [(COL)] freely reviewable by an appellate court.' The determination whether a contract is ambiguous is likewise a [COL] that is freely reviewable on appeal." Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 239, 921 P.2d 146, 159 (1996) (quoting Cho Mark Oriental Food, Ltd. v. K & K Int'l, 73 Haw. 509, 519, 836 P.2d 1057, 1063 (1992)) (internal citations omitted). "Hawai'i appellate courts review [COLs] de novo, under the right/wrong standard. 'Under the right/wrong standard, this court "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it."'" Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999) (quoting In re Estate of Marcos, 88 Hawai'i 148, 153, 963 P.2d 1124, 1129 (1998)) (some internal citations omitted).

III. DISCUSSION

A. The Circuit Court's August 6, 2001 Order Is Appealable Under The Collateral Order Doctrine.

We first consider whether the circuit court's August 6, 2001 order is appealable under the collateral order doctrine.

The Appellees urge this court to dismiss the present appeal as premature pursuant to Hawai'i Rules of Civil Procedure

(HRCP) Rules 54(b) and 58.[3]

This court has stated that

> [j]udgments, orders, or decrees need not be final judgments to be appealable, if they are collateral orders "affecting rights which are independent of, and separable from, the rights asserted in the main action." The collateral order doctrine is narrowly construed; thus, to fall within its confines an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."

Knauer v. Foote, 101 Hawai'i 81, 85, 63 P.3d 389, 393 (2003) (quoting Siangco v. Kasadate, 77 Hawai'i 157, 161, 883 P.2d 78, 82 (1994); Chuck v. St. Paul Fire & Marine Ins. Co., 61 Haw. 552, 555, 606 P.2d 1320, 1323 (1980)). Applying the same test, the Intermediate Court of Appeals (ICA), in Cook v. Sur. Life Ins. Co., 79 Hawai'i 403, 407-08, 903 P.2d 708, 712-13 (App. 1995), determined, as the Appellants correctly note, "that an order enforcing a settlement agreement is a collateral order which is

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[3] HRCP Rule 54(b) provides in relevant part:

> When more than one claim for relief is presented in an action . . . , or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties . . . .

HRCP Rule 58 provides:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), . . . [w]hen the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction . . . .

appealable."[4]

Here, the circuit court's August 6, 2001 order (1) "conclusively determine[d]" that the agreement was enforceable and (2) resolved the details of a compromise among the parties without adjudicating the merits of the underlying claims.

With respect to the third prong of the collateral-order test, the parties agreed that they would "effectuate the dismissal with prejudice of the remaining claims." Consequently, there would be no "final judgment" to "review"; as the ICA noted in Cook, "'[a] voluntary dismissal by stipulation is effective immediately upon filing and does not require judicial approval.'" 79 Hawai'i at 407-08, 903 P.2d at 712-13 (quoting 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2363 (1995)).

Accordingly, this court has jurisdiction over the present appeal by virtue of the collateral order doctrine.

B. The Terms Of The Agreement Are Ambiguous, And Exhibit B Should Reflect Only The Post-1997 Loan Amount.

1. The Appellants' arguments

In their opening brief the Appellants imply that the plain language of the settlement or, in the alternative, the intentions of the parties as manifested in the conduct of the Appellees and Chang, require the Appellees to repay Dorothy's pre-1997 loans pursuant to paragraph 2.a(4), in addition to and

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[4] Moreover, we agree with the Appellants that Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994), "is not intended to apply . . . to appealable collateral orders" inasmuch as this court's opinion expressly contemplated and excluded them. See 76 Hawai'i at 117 n.1, 869 P.2d at 1336 n.1.

notwithstanding those loans' arguable inclusion in paragraph 2.a(2).

a. terms of the agreement

The Appellants note that paragraph 2.a(4) provides that "[a]ll NOI loans properly payable to Dorothy . . . as set forth in Exhibit 'B' attached hereto shall be paid" and does not provide for any "limit[ation]" or "reduction" of any loans. The Appellants further note that the Appellees themselves drafted the settlement language.

The Appellants further contend that paragraph 2.a(2)'s establishment of the settlement fund is no bar to the Appellees' obligation to repay the pre-1997 loans pursuant to paragraph 2.a(4), inasmuch as paragraph 2.a(4) "explicitly provides . . . [that] [a]ll NOI loans . . . shall be paid . . . notwithstanding the establishment of the Settlement Fund."[5]

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[5] The Appellants further employ flawed inductive reasoning to "prove" why the settlement fund cannot subsume the pre-1997 loans. The Appellants reason as follows: the basis for the settlement fund was the windfall allegedly received by Dorothy. The amount that Dorothy saved by allegedly buying the lot for a below-market price lay somewhere between $0 (the Appellants' position) and $200,000 (the Appellees' position). The Appellants assume that the "compromise" value represented by the settlement fund must therefore fall between those endpoints:

> [I]f [the Appellants] are also denied repayment of $175,124.60 of loans . . . , the total would be $59,900.02 plus $175,124.60 for a total of $235.024.62. This would exceed the maximum amount claimed by [the Appellees] . . . . Repayment of all loans . . . is the only way to achieve a compromise payment between $0 and $200,000.00.

(Emphasis added.) This argument is meritless.

Whatever the Appellants mean by implying that this illogical result would obtain "if [they] are . . . denied repayment," (emphasis added), further reductio ad absurdum exposes the argument's fallacy. If the Appellants were correct, the "fix" would be to reduce the amount of pre-1997 loans by at least $35,024.62 -- to no greater than $140,099.98 -- in order to "back up" the resulting "compromise payment" into the proper range. Reduction of Dorothy's (continued...)

(Emphases omitted.) Finally, the Appellants urge that "the agreement is definite and unambiguous" and, as such, "should be interpreted according to its plain, ordinary meaning and accepted use in common speech."

b. Chang's September 15, 1998 letter

The Appellants argue that Chang's letter to the parties' attorneys,[6] inasmuch as it "did not say that only loans made after . . . 1996 should be repaid, nor that loans made through . . . 1996 should not be repaid," "confirm[s]" that all loans, including those made before 1997, should be repaid. Moreover, the Appellants argue, Chang's request for an "updated total of loans" reveals the parties' intention to repay the earlier loans "because if the . . . loans through 1996 were not to be repaid, they would not need updating as they would not be repayable."

c. the parties' course of conduct

The Appellants contend that the Appellees did not object to the Appellants' proposed Exhibit B, notwithstanding its

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[5](...continued)
entitlement is surely not the Appellants' intended result. In any case, the specific amount of pre-1997 loans is irrelevant to the issue on appeal, which is simply whether or not any pre-1997 loans belong in the Exhibit B sum, according to the terms of the agreement.

[6] Chang's letter states in relevant part:

> The changed paragraph 2.a[](4) will reference payment to Dorothy . . . and contemplates the attachment of an Exhibit "B" which shall list all of the loan amounts to September 1998. . . .
> . . . An Exhibit "B," listing the updated total of loans outstanding between Dorothy . . . and [NOI] needs to be provided to . . . Utsumi. May I ask . . . Hosoda . . . to obtain and provide the updated list of loans to . . . Utsumi . . . .

inclusion of the pre-1997 loans: "There was considerable correspondence between the parties' attorneys regarding Exhibit B, yet it was never once questioned that the loans through 1996 should be repaid."

The Appellants emphasize that the Appellees wrote to them multiple times, "expressly acknowledg[ing] that the loans in question" included the earlier loans. That is, "[i]f the . . . agreement called for the repayment of loans made only after 1996, [the Appellees] would [neither] have 'expected that [Dorothy] would be able to prove'" loans prior to 1997 nor have "specifically asked for numerous documents related to those loans," inasmuch "as the loans between 1984 and 1996 would have been irrelevant."

Moreover, the Appellants assert that, on July 8, 1999, they provided copies of eleven missing cancelled checks to the Appellees' counsel, of which nine corresponded to the specific amounts of various pre-1997 loans.

d. inconsistency between the circuit court's oral ruling and its August 6, 2001 order

The Appellants argue that the circuit court's statements during the July 18, 2001 hearing are inconsistent with its August 6, 2001 order: "Despite the [circuit c]ourt's oral ruling . . . that the . . . pre-1997 loans should be added to the . . . loans from 1997 on, the [circuit c]ourt signed and filed [the Appellees]' order that included only the post-1996 loans . . . ."

The Appellants also contend that their "motion for reconsideration should have been granted to correct the error of

failing to include the $175,124.60 of loans to be repaid to Dorothy . . . , and to prevent manifest injustice."

2. The Appellees' arguments

The Appellees counter that the plain language of the agreement provides that "'[a]ll NOI loans . . . as set forth in Exhibit 'B' . . . shall be paid'" and that "[b]oth parties understood that [p]aragraph 2.a(4) and Exhibit B . . . would reflect only [p]ost-1996 [l]oans." (Emphasis omitted.)

With respect to the circuit court's denial of the Appellants' motion for reconsideration, the Appellees argue that the circuit court properly exercised its discretion pursuant to HRCP Rule 59, inasmuch as the Appellants merely "attempted to relitigate the same matters, without any . . . new facts or law, and without showing any clear legal error in the [circuit c]ourt's . . . February 23 and August 6, 2001 [o]rders . . . [n]or . . . manifest injustice." (Citations omitted.) In addition, the Appellees argue that the Appellants' August 14, 2001 motion for reconsideration was untimely pursuant to HRCP Rule 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."), inasmuch as it asked the circuit court to revisit its February 23, 2001 order.

The Appellees further assert that the settlement fund already incorporated the repayment of the pre-1997 loans, represented by paragraph 2.a(2)'s discounting the settlement fund by the amount of $140,099.68, "a compromise as many of [the] Appellants' alleged loans prior to 1997 were not verifiable."

Finally,[7] the Appellees state that the circuit court's August 6, 2001 order was clear notwithstanding the Appellants' argument that "the term 'shall include' was ambiguous. . . . [The] Appellants previously had used the same language . . . , indicating that they knew . . . what 'shall include[]' meant."

3. The Appellants' reply

In their reply brief, the Appellants state that "[o]nce the [circuit] court ruled the settlement enforceable, it was required to enforce the . . . agreement's terms." (Citations omitted.) The Appellants further argue that the Appellees "do[] not dispute nor even address any of" the Appellants' "reasons why the settlement included repayment of both pre-1997 and post-1996 loans."

The Appellants further seek to rebut the Appellees' argument that they "should have objected to the February 23, 2001 order when it was entered." They argue that the circuit court's statement in its order that "[t]he parties ha[d] not yet established the amount of the loans subsequent to . . . 1996 that are to be included in Exhibit B" is reasonably construed to mean that pre-1997 loan amounts already belonged, and would remain, in the Exhibit B figure, rather than being excluded.

Finally, the Appellants counter that the Appellees' presentation of the facts is incorrect and lacks support in the record on appeal. (Citations omitted.)

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[7] The Appellees also state that "the [circuit c]ourt used a rational, reasonable and fair process" to calculate the amount of post-1996 loans. This argument is irrelevant to the dispute, which concerns not the respective amounts of the two categories of loans, but rather the yes-or-no question whether they should have been included in the Exhibit B amount at all; consequently, we disregard it.

4. Analysis

A court construing a settlement agreement, or any other written contract, must start within the four corners of the agreement -- and stop there as well, where the parties' intent is expressed in unambiguous language, viewing the document as a whole. See Found. Int'l, Inc. v. E.T. Ige Constr., Inc., 102 Hawai'i 487, 496-97, 78 P.3d 23, 32-33 (2003); Cho Mark Oriental Food, Ltd., 73 Haw. at 520, 836 P.2d at 1064 ("Absent an ambiguity, contract terms should be interpreted according to their plain, ordinary, and accepted sense in common speech.").

Here, the relevant terms of the agreement are ambiguous, warranting consideration of extrinsic facts to determine which of two arguable outcomes the parties intended to bring about. Compare Kaiser Hawaii Kai Dev. Co. v. Murray, 49 Haw. 214, 228 n.12, 412 P.2d 925, 932 n.12 (1966) ("The contract not being susceptible of two constructions, the 'rule of reasonableness of construction' is inapplicable."), with Amfac, Inc., 74 Haw. at 110, 839 P.2d at 25 ("Where the language of a contract is 'susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not likely enter into, the interpretation which makes a fair, rational and probable contract must be preferred.'") (quoting Mgmt. Sys. Assocs. v. McDonnell Douglas Corp., 762 F.2d 1161, 1172 (4th Cir. 1985)).

We note that $140,099.68, the dollar amount conspicuously enumerated in paragraph 2.a(2)'s formula, is precisely eighty percent of $175,124.60, the pre-1997 loan amount

according to the Appellees' ledger. It is possible that this is purely coincidence, but we doubt it. Especially in light of the circuit court's (1) observation during the January 16, 2001 hearing that the $140,099.68 figure was derived from a compromised percentage (eighty percent) of the pre-1997 loan amount, and (2) finding in its February 23, 2001 order that "[a]ll of the loans . . . before [1997] were addressed under paragraph 2.a[](2)," we favor the "fair, rational and probable" interpretation, see Amfac, Inc., 74 Haw. at 110, 839 P.2d at 25, that the parties intended to discount Dorothy's contribution to the fund by a negotiated portion of the pre-1997 loans, while enabling her to recover the balance of the loans, i.e, the post-1996 loans, and no more, pursuant to paragraph 2.a(4). The Appellants bear the burden of overcoming this interpretation and have failed to do so.

The record on appeal contains no extrinsic evidence to resolve the agreement's ambiguity in favor of the Appellants, i.e., to indicate that the parties intended for Exhibit B to incorporate loans already accounted for elsewhere, effectively doubling Dorothy's recovery of the overlapping loans. Nor does the Appellees' apparent silence with respect to the pre-1997 loans imply their acquiescence to repaying them twice. Nor does Chang's letter's failure to expressly exclude the pre-1997 loans prove that the Appellees expected to repay them twice.

To endorse the Appellants' interpretation of the agreement would be to ignore the parties' intentions and spring a semantic trap upon the Appellees. In light of the foregoing analysis, we apply the more equitable construction, namely that

the Exhibit B amount equals $123,928.26, which the circuit court found to be the amount of post-1997 loans.

C. The Circuit Court's August 6, 2001 is Impermissibly Unclear

Notwithstanding the foregoing, we agree with the Appellants that the circuit court's August 6, 2001 order is misleading insofar as it rules "[t]hat Exhibit B . . . shall include . . . $123,928.26." (Emphasis added.)

IV. CONCLUSION

Accordingly, we vacate the circuit court's August 6, 2001 order and remand for the entry of an order consistent with this opinion and clearly establishing $123,928.26 as the total amount of Exhibit B loans.

DATED: Honolulu, Hawai'i, January 31, 2006.

On the briefs:

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