IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 23 of 2015

NUKU'ALOFA REGISTRY [CV 204 of 2008]

BETWEEN: 1. DANDIN GROUP (TONGA) LIMITED
2. LISIATE TEULILO

- Appellants

AND : AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD

- Respondent

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel: Mr. S. Fili for the Appellants
Mrs. P. Tupou for the Respondent

Date of Hearing : 29 March 2016

Date of Judgment : 8 April 2016

JUDGMENT OF THE COURT

[1] This is an appeal by the Defendants from the judgment of Scott J in favour of the Bank for $192,747.24 with interest at the rate of 15% from 22 December 2012 until the judgment on 7 August 2015.

[2] The banker customer relationship had been mutually satisfactory until the appellant Company's business and it's valuable stock in trade were destroyed by fire during the riots on 16 November 2006. The business and stock were not insured.

[3] On 30 November 2006 Lisiate Teulilo (2nd appellant) owed the Bank $95,873.59 on his personal loan account, and the Company owed the Bank $84,578.71 on its overdraft. Both accounts had been conducted in accordance with the arrangements with the Bank.

[4] After the fire the appellants were no longer able to make regular payments to the Bank from their own resources. Some payments were made and some were received from the

Government as an interest subsidy to assist the Company to recover from the fire.

[5] On 11 April 2007, following his receipt of the Bank's letter of offer of 10 April, the second appellant met 'Ofa Telefoni the bank officer in charge of the accounts to discuss the position. The officer's diary note records "total facilities have been restructured and hardcore OD [overdraft] is to be transferred to existing term loan. LOO [letter of offer] is with customer for acknowledgment and will be provided".

[6] The diary note appears to record the second appellant's agreement to the amalgamation of the two accounts which had the effect of making him personally liable for the overdraft of the Company.

[7] The letter of offer of 10 April was addressed to the second appellant as Managing Director of the Company but both names appeared in the heading and the offer was expressed to be made to both. It provided for the transfer of the Company's overdraft to the second appellant's loan account, and a revised

program of repayments. The Borrower was defined as the two appellants.

[8] The letter concluded "we hereby accept the above terms and conditions" but it only made provision for execution by the Company under its common seal. The second appellant signed but only as Managing Director authorising the use of the common seal.

[9] The second appellant, in the Statement of Defence, denied personal liability for the loan account, for the Company's overdraft, and for the amalgamated account. Viewed in isolation the execution of the Bank's letter of offer by the Company without separate execution by the second appellant provided some support for his denial of responsibility for the Company's overdraft.

[10] The second appellant was clearly liable for the term loan in any event.

[11] However the second appellant's conduct at the meeting with the Bank, on 11 April 2007 and later, evidenced his acceptance of the Bank's offer. The law of Tonga does not require bare loan agreements between banker and customer to be in writing signed by the customer.

[12] On 26 April 2007 the second appellant in his capacity as Managing Director of the Company wrote to the Bank seeking a deferment until July for the first repayment. Following receipt of this letter Mr Telefoni recorded in a diary note dated 9 May that he spoke to the second appellant who said that he had been advised by his lawyer not to sign the letter of offer because it provided for repayments to start in April.

[13] The diary note further records "Have advised Lisiate again that LOO is for the amalgamation of his hardcore OD TL in which he agreed with it but he still needs a letter" about the deferment. The Bank later provided that letter but it was expressed to be subject to return of its LOO duly signed and accepted.

[14] The appellants made the agreed payments of $3630 for some months after July, and some intermittent payments thereafter. The last payment from the appellant's resources was made on 11 September 2008. Payments of the Government's interest subsidy continued to be received by the Bank until January 2010.

[15] On 29 February 2008 Mr Yeoman for the Bank replied to the second appellant's letter of 28 February 2008 complaining of some events in November 2005, which did not feature later in the trial. Mr Yeoman's letter stated "At this stage I would also like to remind you that the loan provided by ANZ Bank is to you personally, and not to your business".

[16] The second appellant replied on 17 March 2008 without challenging the claim that he was personally liable for the debt, Mr Yeoman wrote to him again on 18 March referring to "your outstanding loan repayments, "your facilities", and "your loan".

[17] Mr Yeoman's diary note of 11 September 2008 relating to a meeting with the second appellant that day records his

statement to the second appellant that "the Bank will not tolerate any more default in his payments".

[18] The second appellant's letter to Mr Yeoman on 24 September 2008 (pp 2-3) contained many admissions of his personal indebtedness to the Bank.

[19] After the Bank's lawyer sent a letter of demand to the appellants on 11 November 2008 the second appellant wrote to Mr Griffiths of the Bank on 5 December saying that he would "keep on fighting to pay up my due".

[20] The Bank's statements of account record the closing of the Company's account, the transfer of the debt to the second appellant's account and the subsequent history. The second appellant accepted those statements without objection.

[21] The oral evidence of the second appellant did not advance the claim that he was not personally liable for the whole of the combined account. AB 257 "I ... signed the contract", AB 260 "I

signed it", "we signed it", AB 261 "my debt", "help me to pay the bank's money and get me out".

[22] Scott J rejected the argument that the company was the only party who entered into the April 2007 agreement and held that both defendants were liable for the consolidated debt. There was ample evidence to support that finding and it cannot be disturbed.

[23] The appellants made an application on notice to call further documentary evidence in the appeal but knew of the documents' existence before the trial, and had them in their possession. The Court heard Mr Fili in support of this application at the outset, but it was without merit and was dismissed without Mrs Tupou being called on. In any event the documents would not have supported the appellants' case.

[24] The grounds of appeal in the notice of appeal and the written submissions for the appellants included many which were entirely without merit. A limited liability company is liable for its own debts but its members are not once their shares are fully

paid up. It is the liability of the members which is limited. The change in the name of the Company did not affect its liabilities. The memorandum of satisfaction of the Company's debt referred to the debt owed to MBF Bank not the ANZ Bank. The Bank was not obliged "to ensure that the Borrower is well covered by valid insurance". The appellants were not misled about the loss of some of the Bank's records in the riot on 16 November 2006.

[25] The Bank was not liable in defamation for publishing the appellant's defaults because under the law of Tonga truth is a complete defence.

[26] The allegation that the trial Judge denied the appellants' right to trial by jury is not supported by any evidence.

[27] The complaints about the conduct of the Judge during the trial are not supported by anything in the transcript in the appeal book, or other evidence.

[28] The submission that the Bank's conduct was unconscionable is without any basis in the evidence. The second appellant, a hitherto successful business man, did not sign the agreement of 10 April 2007 until 2 July after taking legal advice and renegotiating an important term. The Bank's charges were based on it's rights under that agreement.

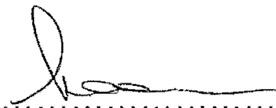
[29] The appellants challenged the copy bank statements and documents produced by the Bank from its computer records, but the inability to produce the originals was explained by their loss in the riot. The trial Judge found no reason to doubt the accuracy of the computer generated statements and nor do we.

[30] In general a Bank does not owe a fiduciary duty to its customers. The existence of a special fiduciary duty must be based on unusual facts which must be proved. There was nothing fiduciary about the relationship between the appellants and this Bank.

[31] The appellants challenged the Judge's assessment of damages for the Bank's breach of the implied term of confidentiality. The

Judge held that the purpose of the Bank's implied promise was to prevent the customer suffering vexation. This only applies to the second appellant because a company cannot be vexed. We see no error of principle in the Judge's award of $7500 and do not consider that it was so inadequate that this Court would have to intervene.

[32] The appeal fails on all grounds and is dismissed with costs.



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Blanchard J

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Tupou J