IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 8 & 10 of 2015

NUKU'ALOFA REGISTRY [CV 161 of 2009]

BETWEEN : AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

- Appellant

AND : 1. MATAME'AFO'OU KAVAEFIAFI

2. KALOLAINE KAVAEFIAFI

- Respondents

Coram : Moore J
Blanchard J
Hansen J
Tupou J

Counsel : Mrs. P. Tupou for the Appellant
Mr. 'O. Pouono for the Respondents

Date of Hearing : 10 September 2015

Date of Judgment : 16 September 2015

JUDGMENT OF THE COURT

[1] In May 2004 Australia and New Zealand Banking Group Ltd made an advance of TOP$64,015 to one of its employees, Mr. Kavaefiafi and his wife. We will call them "the borrowers". The loan was for the purpose of enabling them to build a house on a town allotment.

[2] As the appeal is now confined to one issue, on which the parties were in agreement at the end of the hearing before us, it is unnecessary to describe the terms of the loan or how it came about that the borrowers defaulted in their obligation to make the payments required under the loan agreement.

[3] The bank commenced a proceeding in the Supreme Court seeking judgment for $109,372 plus accruing interest.

[4] It was alleged by the borrowers in their defence that because of their personal circumstances at the time the loan was made the transaction was unconscionable; that the bank knew very well when the loan was made that the borrowers would be unable to meet their monthly repayment obligations.

[5] In a judgment delivered on 13 March 2015 Scott J found that the borrowers were at a special disadvantage vis-a-vis the bank and that the bank knew this. He also found that the bank had not discharged the onus of proving the fairness of the transaction.

[6] Then the Judge said:

> *[25] The final question is: What follows from the conclusion that it would be inequitable to allow the mortgage contract to be enforced? As I see it, a distinction must be drawn between the money advanced and the security and its terms as required by the Bank. The finding that the bank cannot take advantage of the mortgage agreement does not mean that the capital sum advanced need not be repaid. The result therefore is that there will be judgment for the bank for the sum advanced, $64,015.00. If satisfactory terms for the repayment of this sum cannot be negotiated the bank will have to resort to whatever means it may have to enforce repayment apart from those afforded to it by the mortgage.*

[7] Scott J made an order entering judgment for the bank for the sum originally lent to the borrowers together with interest from judgment until satisfaction of that debt. This order had the effect of reducing the principal amount that the bank had claimed and disallowing its claim for unpaid interest prior to the date of the judgment. It will be noted that despite what was said in para [25]

of the judgment, the order said nothing about the mortgage security.

[8] Both sides then appealed but at the commencement of the hearing the borrowers withdrew their appeal and by consent we made an order dismissing it. It had been made clear by the bank that it was not seeking to appeal against the order limiting the borrowers' liability to TOP$64,015.

[9] That left the bank's appeal but it had also became apparent that the bank was not attempting to challenge the Judge's order. Rather, it was concerned about the comment in which he appeared to say that if terms for repayment of the TOP$64,015 could not be negotiated the bank could not enforce its mortgage and would have to resort to other means to recover that amount.

[10] But, as that was an obiter remark and not part of the order of the Court, it was not appealable. We readily appreciate, however, why the bank has sought to bring the matter to this Court.

[11] For the bank, Mrs. Tupou submitted that the question of enforcement of the mortgage was never before the Supreme

of the judgment, the order said nothing about the mortgage security.

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[10] But, as that was an obiter remark and not part of the order of the Court, it was not appealable. We readily appreciate, however, why the bank has sought to bring the matter to this Court.

[11] For the bank, Mrs. Tupou submitted that the question of enforcement of the mortgage was never before the Supreme

Court as the bank had simply sued the borrowers for the debt that it claimed was owing under the loan agreement. It had not yet sought to enforce the security.

[12] We accept that submission. If the bank is unable to resolve the terms of repayment it can still seek to enforce the mortgage in the Land Court. No question of liability can now be in issue in that Court as it has been determined that the borrowers have an indebtedness to the bank of TOP$64,015.

[13] The position that has been reached in the case is now broadly consistent with the view taken in Australian courts that a mortgage is not to be set aside as an unconscientious transaction unless the borrower accounts to the lender for any retained (or "unwarranted") benefit it has received: see *Maguire v Makaronis* (1996) 188 CLR 449 at 476 – 7 and *Elkofairi v Permanent Trustee Co. Ltd* [2002] NSWCA 413 at [80] and [98]. In this case the unwarranted benefit was the money the borrowers were able to use to build themselves a home.

[14] Because there was no appealable issue before us, the bank's appeal must be dismissed. There will be no order for costs in relation to either of the appeals.

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Moore J

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Blanchard J

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Hansen J

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Tupou J