IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION **AC 17 of 2012**

NUKU'ALOFA REGISTRY **[CV 120 of 2011]**

BETWEEN: **1. SOSAIA MOEHAU**

2. EPIC INTERNATIONAL LTD

- Appellants

AND **:** **WESTPAC BANK OF TONGA**

- Respondent

Coram **:** **Salmon J**

Handley J

Blanchard J

Counsel **:** **Mr. S.J Stanton SC and Mr. O. Pouono for the Appellants**

Mr. R. Stephenson for the Respondent

Date of hearing **:** **10 April 2013**

Date of judgment **:** **17 April 2013**

JUDGMENT OF THE COURT

[1] Mr. Moehau and Epic International Ltd appeal against a decision of the Lord Chief Justice ordering summary judgment against each of them in favour of Westpac Bank of Tonga for sums of TOP$985,077.59 and TOP$929,397.44 respectively together with interest and costs.

[2] Westpac's claim against Mr. Moehau was for recovery of an amount lent to him under a loan agreement entered into on 23 April 2009 (for a loan of TOP$939.925.00 plus interest and costs). Its claim against Epic was under a guarantee given on the same day in respect of that loan but limited under the terms of the guarantee to TOP$921,000 plus interest and costs. At that time Mr. Moehau was the sole director and shareholder of Epic and executed the guarantee on its behalf as its director/secretary.

[3] The relationship between Mr. Moehau and the bank goes back further than April 2009, for in September 2007 the bank had lent him or persons associated with him, a sum in excess of TOP$2 million. Evidently difficulties had arisen in respect of that transaction but by April 2009 a part of the TOP$2 million had been repaid. After negotiation with the bank, during which Mr. Moehau had the advantage of advice from his counsel, Mr. Stanton, it was agreed that the balance outstanding should be restructured as the new advance and guarantee previously described.

[4] It was a term of the new loan agreement that any consolidation of previous borrowings was to be governed by the terms of the new loan. Mr. Moehau also acknowledged in the loan agreement that he relied upon his own judgment and not on any representation or advice given by the bank. He further acknowledged being advised by the bank to obtain independent advice and agreed to absolve the bank from any liability for any misrepresentations or negligent advice by the bank or its officers.

[5] The new loan too fell into arrears and after making several successive demands for payment the bank sued the appellants for the debts said to be respectively owed by them.

[6] The application for summary judgment was resisted in the Supreme Court on several grounds some of which have been raised again in this Court. The bank of course had to satisfy the Supreme Court that Mr. Moehau and Epic had no defence to the claims against them or any part thereof (Order 15 rule 2). The appellants say that summary judgment should not have been entered for several reasons:

(a) That in their statement of defence and/or affidavits they had put in issue arguable matters of fact which were not capable of proper resolution in a summary judgment application.

(b) That there was an arguable defence that because of certain representations said to have been made by officers of the bank to Mr. Moehau the bank was estopped from relying upon Mr. Moehau's admitted failure to make repayment of the loan advance in accordance with the terms of the loan agreement. In summary, it is contended for the appellants that Mr. Moehau was orally assured (before or during the negotiations leading to the restructuring) by bank officers that:

i. In view of the of the difficult financial situation prevailing in Tonga and elsewhere (the so-called global financial crisis) Mr. Moehau would not be held strictly to the repayments required under the loan agreement but could instead pay the bank "only what he can afford to pay";

ii. Mr. Moehau would not be personally sued by the bank which would, instead, take over certain valuable leasehold properties in respect of which security for the restructured loan advance was to be given; and

iii. The guarantee would be treated as limited to a single amount of TOP$500,000 to be recovered only from the proceeds of sale by Epic of its interest as lessee in Lease No. 2934.

(c) That the bank had acted unconscionably in relation to the restructuring of the loan (contrary to its internal policy manual) and in making demand and seeking to enforce the terms of the loan agreement, in particular by lending recklessly to Mr. Moehau and inducing in him a belief that it would not enforce the loan or call on the guarantee without giving reasonable time or allowing a moratorium; and

(d) That the bank had been under a duty to the appellants to act in good faith and had breached that duty, in particular by treating some other borrowers more favourably than Mr. Moehau.

[7] The Lord Chief Justice considered that none of these assertions raised an arguable defence. He observed, as is the case, that Mr. Moehau did not deny entering into the loan agreement of April 2009 or failing to meet his repayment obligations. Mr. Moehau also admitted receiving demands for repayment.

[8] The Chief Justice said that the issues raised of unconscionability and good faith (and an allied allegation that Mr. Moehau had not been afforded a sufficient opportunity of obtaining legal advice on the loan documentation) could be treated together. Dealing with the question of legal advice, the Chief Justice made reference to passages in Mr. Moehau's affidavit in response to the summary judgment application and to certain letters written to the bank by or for Mr. Moehau. He concluded that "Mr. Stanton was intimately and actively concerned in the detailed negotiations between the Bank and the First Defendant [Mr. Moehau] which were taking place with a view to reaching an acceptable restructuring of the First Defendant's debt to the Plaintiff." He said that it was clear that Epic's position was also under consideration by Mr. Stanton.

[9] The Chief Justice was satisfied that Mr. Moehau was a professional and experienced businessman who employed the services of a competent legal adviser to advise him in connection with his dealings with the bank and that he did not enter into the loan restructuring agreements suffering from any form of bargaining disadvantage.

[10] Having dealt in that way with the unconscionability defence, the Chief Justice shortly rejected the notion that the bank had been under a duty to act in good faith towards the appellants in enforcing the loan agreement. An alleged ill-will of one of the bank's managers towards Mr. Moehau was, he said, irrelevant to the question of whether Mr. Moehau and Epic had any defence to the action against them.

[11] The Chief Justice then dealt with whether it was open to them to claim that the agreements as executed, did not (because of the alleged oral

representations on behalf of the bank) correctly state the terms of the restructuring agreement.

[12] He accepted the submission of counsel for the bank that this was precluded by section 79 of the *Evidence Act* (Cap 15) (corresponding he said with the common law rule) which distinguishes between an oral agreement contradicting, varying, adding or subtracting from written contractual terms (inadmissible) and an oral collateral contract upon the subject of which the written contract is silent and which is not inconsistent with the written terms (generally admissible). The Chief Justice was of the view that in this case Mr. Moehau was suggesting that the parties orally agreed that the written terms, in particular regarding repayment, would not be binding on him. That was wholly inconsistent.

[13] Finally, the Chief Justice succinctly disposed of two further defence contentions raised again on this appeal. He said that any breach of the bank's guidelines in its manual (which was not before the Court) was a matter for the bank only. The global financial crisis in 2008 had no relevance to agreements entered into by the appellants in 2009; events prior to 2009 could not affect the validity of the restructuring agreement subsequently reached. Mr. Moehau's signature on the Business Finance Agreement (incorporated in the loan agreement) was an unconditional acceptance that, despite anything that might have happened beforehand, the debt being restructured was due.

[14] Summary judgment was therefore entered.

[15] Order 15 rule 2 of the *Supreme Court Rules 2007* requires that summary judgment can only be given on the ground that the defendant has no defence to the claim, or any part of the claim "save as to the amount of damages". The qualification enables a summary judgment to be given on liability only, with the issue of quantum of damages or further damages to be determined at trial.

[16] An application for summary judgment must be supported by an affidavit, inter alia, verifying the facts on which the claim is based: Order 15 rule 3 (1). It may, unless otherwise ordered by the Court, contain statements of information or belief provided the sources and grounds thereof are stated. The appellants have raised objections to

some of the content of the bank officers' affidavits in this case notwithstanding that they themselves had not complied with Order 27 rule 1. It requires notification to the other party of whether or not consent is given to the use of an affidavit within 7 days of receipt of it, with failure to do so being consent. We have nevertheless considered the admissibility of the bank's affidavits, but take the view that any issue of admissibility relates to passages that are in the result immaterial to our decision. The respondent, for its part, raised no objection to Mr. Moehau's affidavit in answer.

[17] Notwithstanding the plethora of authorities on the point placed before the Court by counsel for the appellants, there can really be no dispute about what a plaintiff applying for summary judgment must demonstrate. Under Order 15 rule 2 and comparable rules in other jurisdictions a defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail. The Supreme Court must be satisfied, in other words, that the asserted defence has no prospect of succeeding at trial. In a case in which there is a factual contest it may not be proper to enter summary judgment and deprive the defendant of the exercise of the right to a trial. But merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statements by the same deponent or inherently improbable in itself it may be": *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.

[18] In this case, what is in our view a critical component of the appellants' defence, as asserted in its statement of defence and Mr. Moehau's affidavit evidence, is the oral statements or assurances allegedly made by the bank's officers prior to or during the restructuring negotiations in 2009. They are summarized at [6] (b) above. They are denied by the bank officers in their affidavits. We have considerable scepticism about them. How likely is it, for instance, that a bank officer would, contrary to the loan documentation, contemporaneously tell Mr. Moehau that he could pay the bank only what he could afford to pay,

or that the bank would agree to restrict itself to the leasehold securities and not sue him personally? And if in fact the bank officers did actually make the statements attributed to them by Mr. Moehau during the negotiations in 2009 it would be surprising if he did not inform Mr. Stanton, and even more surprising that, if he did so, Mr. Stanton would not have sought to have them recorded in a writing to form part of the restructuring documentation. Nothing of this sort appears in the correspondence or is deposed to.

[19] But we put these doubts to one side because, in any event, statements of that kind, which are in the nature of promises that some basic terms of the restructuring were not to be as stated in the loan documentation, fall plainly within the terms of the prohibition on admissibility found in s79 of the *Evidence Act* (Cap 15). That section puts into a statutory, and therefore mandatory, form the well-known parol evidence rule of the common law whose rationale is the preservation of finality in written instruments which are intended to reflect the bargain reached by the parties. Written words in such instruments are not to be altered or qualified by the "uncertain testimony of slippery memory": *Bacchus Marsh Concentrated Milk Co. Ltd v Joseph Nathan* & Co. Ltd (1919) 26 CLR 410 at 451-2.

[20] Subject to certain exceptions, which appear to have been framed so as to capture situations in which the parol evidence rule would not stand in the way of admissibility at common law, s.79 directs that where any transaction (here the restructuring) has been reduced to the form of a document (here the loan agreement and the guarantee), no evidence of any oral agreement or statement is to be admitted as between the parties to the document or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms. That is exactly the appellants' purpose in referring to the alleged statements. It is not suggested that, if made at all, they were deceptively or falsely made at the time or that by mistake they were not recorded in the written documentation and therefore could fall within the exception in paragraph (a) of the proviso to the section which, amongst other things, provides for admissibility in cases of fraud or where it is sought to rectify written terms.

[21] It was Mr. Stanton's submission, nonetheless, that the statements amounted to representations which gave rise to an estoppel preventing the bank from denying that the loan documentation had been qualified by them. He said that in such a situation s79 did not bar his clients' reliance upon them to establish an arguable defence that the appellants were not in default of their (qualified) obligations to the bank, and also to establish an element of an arguable defence that the bank had acted unconscionably or with want of good faith. He argued that a Tongan court in its equitable jurisdiction should not in these circumstances decline to admit evidence of the making of the statements because of the admissibility bar found in s79.

[22] We consider, however, that the purpose of s79 is so obvious and its terms so clearly expressed that it would be wrong for a court to disregard them, or to place upon them the construction which would be necessary if counsel's argument were to be accepted. If, for example, Mr. Moehau were permitted to give evidence that the limit on Epic's guarantee was agreed in the negotiations to be TOP$500,000, that would completely contradict the statement in the guarantee that the limit was TOP$921,000.

[23] The very reason for reducing the transaction to writing, to achieve certainty about its terms, would be defeated and the parties exposed to the uncertainty of litigation to determine what was agreed upon. It would be all too easy for someone repenting of their bargain, or wishing perhaps to delay its enforcement, to claim that there were oral qualifications which displaced or modified terms of the document and created an estoppel preventing denial of the qualifications. The section prohibits this. The further exception in paragraph (d) of the proviso, allowing evidence of a distinct *subsequent* oral agreement to rescind or modify the terms of a document, points to the strength of the prohibition in relation to prior or contemporaneous promises or assurances. Oral agreements or statements can be admitted to contradict a document reducing a transaction to writing only where they are made subsequent to the document (which the alleged promises to Mr. Moehau were not) or where another exception to the rule applies under the proviso.

[24] This operation of the section should come as no surprise, for cases under the parol evidence rule produced the same result. It is sufficient to refer to the leading case of *Hoyt's Proprietary Ltd v Spencer* (1919) 27 CLR 133, mentioned by the Lord Chief Justice, in which a term in a memorandum of lease gave the lessor a power of termination on 4 weeks' notice. The lessee claimed that the lessor had orally promised at the time when the lease was granted not to exercise that power except when requested to do so by a third party, which request had not been made, and it claimed damages for breach of contract. The High Court of Australia upheld the argument for the lessor that the oral agreement and the term in the lease were inconsistent and that the oral agreement was invalid and unenforceable for that reason.

[25] We add that in the present case the asserted representations could give rise to an estoppel only if there were also present the required elements of inducement, reliance and resulting detriment, which are not pleaded. A further and major difficulty for the appellants are the terms and acknowledgments in the loan agreement of 23 April 2009 to which reference has been made in [4] above.

[26] The appellants' inability to adduce evidence of what they allege Mr. Moehau was told by the bank officers means that the proposed defence of unconscionable conduct on the part of the bank in the negotiation of the restructuring or in calling up the loan and guarantee when default was made, cannot possibly succeed.

[27] Unconscionability is a doctrine of equity. It involves a party who is suffering from a special disability or is in some special situation of disadvantage, and an unconscionable taking advantage of that disability or disadvantage by another. It does not apply simply because the party has made a poor bargain or just because there is an inequality of bargaining power. The disabling condition or circumstance must seriously affect the ability of the affected party to make a judgment as to his or her best interests: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 477 and *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [5]-[14].

[28] The terms of the restructured loan and the guarantee in this case were unexceptional, particularly in circumstances where the bank was not making a new advance but was making part of an existing loan available for a further period after the borrower had encountered some financial difficulty. Mr. Moehau was an experienced businessman who was not suffering from some special disability. Contrary to what is put forward in the statement of defence and in Mr. Moehau's affidavit, he and Epic were throughout the restructuring process assisted by the advice of Mr. Stanton, a senior counsel of Tonga and a member of the New South Wales bar. The correspondence between Mr. Stanton and the bank and its counsel which is in evidence gives the lie to any suggestion that the bank was taking improper advantage of someone in a weaker position. Mr. Stanton negotiated strongly and effectively on behalf of his clients and can be assumed to have advised them competently and dispassionately, pointing out all the risks associated with the transaction. A lender is entitled to so assume. It is not for the lender to question the competence or independence of the legal adviser of the borrower, save in exceptional circumstances not present in this case: *Bank of Baroda v Rayarel* [1995] 2 FLR 376 (EWCA) and *GE Custodians v Bartle* [2011] 2 NZLR 31 (NZSC) at [48].

[29] On the admissible evidence it is clear that Mr. Moehau and Epic did not suffer from any situation of special disadvantage or disability of which the bank took advantage unconscionably at the time of the restructuring of the loan.

[30] Nor does anything in the evidence of subsequent events support the appellants' argument that such a situation existed when the bank made its final demand and issued the present proceedings. In his written submissions, Mr. Stephenson described the events leading up to those actions. We did not understand Mr. Stanton to question that account. The loan agreement gave the bank the right to call up the loan if the borrower made default in any repayment for 30 days. The bank did not take such a step until 6 April 2011. It had previously granted deferrals of its right to have repayment instalments increased and had tolerated shortfalls in payments throughout 2010. After service of its letter of demand the bank engaged in settlement discussions with Mr. Moehau before making a second demand. It then waited a further period of 37 days before making demand on Epic and

legal proceedings followed another 56 days later on 28 November 2011. Far from acting unconscionably, the bank appears to have been cautious and reasonable in exercising its legal rights against the appellants.

[31] By the same token, we find nothing in the admissible evidence supporting the appellants' argument that the bank acted towards them with recklessness or any lack of good faith, whatever role those concepts may play in modern banking or contract law - matters which we leave for another day.

[32] The appellants submitted that the bank's responsibility in law to them was somehow affected by the existence of the global financial crisis which began in 2008. As the Chief Justice said, that had begun well before the restructuring took place. Despite Mr. Stanton's best efforts, we cannot view it as placing upon the bank any additional duty to Mr. Moehau and Epic, who must have been well aware of its effects when they chose to enter into the new arrangements in 2009. It was certainly not something which Westpac inflicted on Mr. Moehau or which could have affected contractual or other duties towards him

[33] The appellants also contended that the bank's lending to Mr. Moehau may have departed from the guidelines for its lending staff in its internal manuals. This is entirely a matter of speculation for the manuals are not in evidence. But even if it were so, that would go nowhere towards showing that the bank acted in breach of duty towards the appellants, particularly as this was not a new loan to an unblemished borrower. It was in substance, if not in form, an extension of the balance of an existing loan which the borrower appears to have been unable to repay in 2009. In that circumstance, the fact that the loan may possibly have been of an amount, or on other terms, not available to a "new" borrower is neither here nor there. Similarly, the equally speculative argument that the bank may have given other customers more advantageous terms or greater leniency, does not even arguably establish some impropriety in the lending or the recovery process. The law does not require that a bank must treat all its customers alike regardless of their differing credit histories and circumstances.

[34] In agreement with the Lord Chief Justice, we are satisfied that none of the proposed defences has any prospect of succeeding at trial. They are clearly untenable. The appeal is dismissed with costs.

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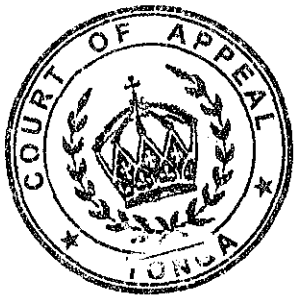
Salmon J



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Handley J

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Blanchard J