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21/03/15
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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 161 of 2009**

BETWEEN: **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**
- **Plaintiff**

AND : **1. MATAME'AFO'OU KAVAEFIAFI**
2. KALOLAINE KAVAEFIAFI
- **Defendants**

Mrs P. Tupou for the Plaintiff.
'O. Pouono with K. Piukala for the Defendants.

JUDGMENT

[1] This judgment follows my Decision of 26 October 2012.

[2] It is not in issue that on about 17 May 2006 the Plaintiff (the bank) agreed to lend the Defendants $64,015.00 via a housing loan facility. The Defendants were already indebted to the Plaintiffs at that time. The First Defendant had joined the bank as a driver in about 2000 and in 2001 he took advantage of his position as an employee to take several small loans of several hundreds of dollars each to meet family commitments (Documents 1 to 10). It seems that a further more substantial loan was approved in 2002 amounting to $5,500.00 (Document 11).

Rec'd 20/03/15

[3] In due course the various accounts were consolidated. The Defendants fell into arrears with the repayments and on the date the writ was issued were said to owe the bank $109,372.52 with interest accruing at 12.5%. The bank seeks judgment in this amount.

[4] The housing loan was secured by a mortgage over a town allotment belonging to the First Defendant's father and of which he was the heir apparent. Unfortunately, the mortgage document and the letter of offer were not produced, apparently having been destroyed by fire during the events of November 2006. The closest contemporary document is 43 which discloses a loan advance of $73,000. It is not clear how this sum relates to the sum of $64,015.00 which appears in paragraph 3 of the Statement of Claim.

[5] The First Defendant told the Court that as well as driving for the bank he also did odd jobs for the Loan Manager Rakesh Ram. According to the First Defendant, Rakesh was interested in his personal circumstances, established that he as yet had no home of his own but was expecting to inherit his father's land and suggested that he take a housing loan with which to build a home for himself, his wife and children on his father's land.

[6] According to the First Defendant he told Rakesh that he did not think he would be able to service such a loan as he was only earning $50 per week and his wife not much more. According to the First Defendant Rakesh told him not to worry, he could have whatever he required. He advised him to make enquiries to find out how much it would cost to build a house. Once he had made enquiries he found

out that the house would cost about $73,000 and that was the sum he applied for.

[7] The First Defendant told the Court that the loans department at the bank at first rejected his application on the ground that it was beyond his means to service a loan of such a size. He then spoke to Rakesh and the loan was approved. Over the next months he drew down on the loan until his indebtedness appears to have reached $90,207.43 in October 2005 (Documents 25 & 26).

[8] The repayment amount on the housing loan was $807.00 per month and these repayments were made fairly regularly during 2005 and the first half of 2006. In 2007 the First Defendant resigned from the bank; his wife, the Second Defendant was expecting their third child and "there was nobody else to help". After the First Defendant stopped working the account fell into arrears. Several attempts were made to restructure the loan but in April 2009 repayment of the whole sum due was demanded. Nothing was paid and proceedings were commenced the following June.

[9] In answer to questions, the First Defendant said he had left school at Form 5. He had worked as a waiter, a shop assistant and at an acquarium before taking the driving job with the bank. He accepted that it was wrongly stated that he was only earning $50 per week and that in fact, at the time of the loan his take home pay was $147.15 per week. He was also getting about $20 per week cash in hand from Rakesh. He and his wife did not run a shop at this time. He was worried that they would not be able to service the loan "but Rakesh insisted". Since leaving the bank in 2007 he has not worked.

[10] The second witness was the Second Defendant. She is the Finance Manager of the Tonga Community Development Trust (see Document 63) and now earns $25,000 per annum with the use of a motor car. She has obtained certificates in bookkeeping and accounting. She stated that she was earning only $80 per week when the loan was approved but when shown Document 86 accepted that the correct figure was nearer to $143.85 per week. It was not clear when she had begun with the TCDT but by July 2007 she was already earning $15,000 (Document 63).

[11] The Second Defendant told the Court that when her husband told her about Rakesh's suggestion she regarded it as "the door being opened by the Lord". "Let us pray about it". They did not discuss their ability to repay the loan and she did not know what the monthly repayments were. She first saw the $807 figure when she went to the bank to sign the contract. "It never crossed my mind that we were borrowing more than we could repay, I was so excited". According to the Second Defendant, the terms and effect of the documents signed by them were not explained to them.

[12] Mrs Tupou asked the Second Defendant about a shop that she and her husband operated. The Second Defendant denied that the shop was operating in 2006 when the loan was taken out; no profits from the shop were taken into account when the loan was applied for.

[13] The only significant witness for the bank was Leilani Va'enuku who produced a brief of evidence (Exhibit 1). Although she was a member

of the loans unit at the Bank she did not give any evidence of her own personal dealings with the Defendants. At paragraph 3 she stated:

> "the bank simply does not lend money if the borrowers do not meet its criteria and this includes staff. I believe the Defendants' case was no different".

[14] At paragraph 15 to 21 she explained that according to her information the Defendants' income qualified them for a loan of about $58,500 with repayments of $646.66 per month. Given that document 43 reveals the initial indebtedness to be $73,000:

> "I believe that the defendants did satisfy the bank to have been in that income bracket from their other income for their loan to have been given".

[15] At paragraph 30 she stated:

> "there is no record on the bank's file that the Defendants once complained that the bank had taken advantage of them".

[16] At paragraph 33 she stated:

> "In December 2008, according to the Bank's records the account was in order, clear evidence that the Defendants were well capable of repaying their debt when they wished to".

[17] In August 2012 the bank applied for summary judgment. On 26 October 2012 I dismissed that application. I noted that the Defence pleads that the loan agreement was "unconscionable and/or inequitable" and expressed the view that this defence was not obviously unarguable.

[18] The elements of the equitable doctrine of unconscionable dealing are helpfully explained in Chapter 9 of Dal Pont & Chalmers "Equity and trusts in Australia" Lawbook Co. 2007. Paragraph 9.05 states:

> "Equity has a jurisdiction to prevent a stronger party to an unconscionable dealing acting against equity and good conscience by enforcing or retaining the benefit of that dealing. It is not a paternal jurisdiction protecting or assisting those who repent of imprudent, foolish or onerous bargains or undertakings. Nor does it arm the Courts with a general power to set aside bargains simply because they appear unjust, onerous or harsh. Rather, it protects those under a disadvantage from those who take advantage of that fact. It follows that the exercise of the jurisdiction is an exceptional one; the Courts enforce legal rights except in circumstances which are so far out of the ordinary course, so much an enormity and a departure from ordinary standards of conduct that the position of a person who relies on legal rights should rightly be adjudged unconscionable. It arises from a concatenation of three elements:
>
> (i) A relationship that places a party at a special disadvantage vis-a-vis the other party;
> (ii) Knowledge of that special disadvantage in the stronger party; and
> (iii) Unconscientious exploitation by the stronger party of the weaker party's disadvantage.

If the weaker party proves the first two elements the burden then shifts to the stronger party to prove that he or she [or it] is not behaving unconscionably in seeking to enforce the transaction".

[19] Discovering the precise circumstances in which the agreement between the parties was established in 2006 was not made any easier by the bank's failure to call any witnesses who actually had dealings with the First Defendant. In paragraph 9 of my Decision of 26 October 2012 I pointed out that no evidence had been filed to counter the Defendants' assertion that the bank "induced them to enter into a contract which it knew perfectly well they could not afford to honour". The evidential situation in March 2015 is essentially the same. In particular the bank chose not to call Rakesh (apparently now working for the bank in Fiji) to answer the Defendant's claim. The Second Defendant's assertion that no explanation of the mortgage was given to them was unrebutted.

[20] In my view the evidence of Leilani Va'enuku tended to assist the Defendants rather than the bank. To argue that they were lent more than their salaries entitled them to and therefore unspecified income must have been taken into account overlooks the fact that mistaken decisions and calculations occur in banks just as they do elsewhere and also provides some admittedly tenuous support for the First Defendant's evidence that the initial refusal of the loans department was overruled after he had reported the matter to Rakesh.

[21] It is clear to me that there was no equality of arms between the parties, on the one hand a major financial institution and on the other a driver and handyman and his then unqualified and still relatively

modestly paid wife. In these circumstances it was, in my view, essential to produce some contemporary evidence of what occurred when the loan and mortgage were first negotiated. In my view it would be quite wrong simply to assume that everything was done properly. I am also of the view that the subsequent restructuring is of little relevance to the formation of the contract. Once the Defendants got into difficulties they would sign anything in an attempt to hold on to their house, whether they believed what they signed was true or not. The statement in paragraph 33 of Leilani's brief of evidence already quoted is simply misleading. The account was in order not because there were not substantial arrears but because the debt had been restructured. This provides no evidence at all that the Defendants were able to service the loan in 2008. Furthermore, the important question is not whether they were subsequently able to service the loan but whether they were in any realistic position to do so when it was first taken out.

[22] The second element, knowledge by the bank of its advantageous position I find, in the circumstances of this case, to be self-evident.

[23] In my opinion the Defendants have established *prima facie* that the first two elements identified in the passage quoted on paragraph 10 have been satisfied. The onus then shifted to the bank to prove that it would not in fact be unconscionable to take advantage of it:

> "The burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of it". (*O'Rorke v Bolingbroke* (1877) 2 App. Cas. 823).

[24] In my judgment the bank has fallen some way sort of discharging the burden cast upon it. I was not in fact especially impressed with the frankness of either of the Defendants however in the absence of almost anything to rebut their evidence it has, on the balance of probabilities, to be accepted.

[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.

Result: Judgment for the Plaintiff for $64,015.00 with interest accruing at the rate of 10% from judgment until satisfaction.

M.D. Scott
JUDGE

DATED: 13 March 2015.

M. Taufa
12/03/2015