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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 25 of 2014**

BETWEEN: **WESTPAC BANK OF TONGA**

- Plaintiff

AND: **KISIONE FAKAFANUA**

- Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: **Ms. L. Tonga for the plaintiff**
Mr. O Pouono as agent for Mr. S Stanton for the defendant

Date of Hearing: 4 September 2015.
Date of Ruling: 7 September 2015.

RULING

[1] The plaintiff bank applies for summary judgment against Kisione Fakafanua (Mr. Fakafanua) seeking judgment for the amount alleged to be owing under a personal guarantee Mr. Fakafanua gave in respect of a loan made by the bank to Mr. Fakafanua's company Faua Developments Limited (Faua). Mr. Fakafanua disputes his liability under the guarantee and says that the guarantee was obtained by

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undue influence and/or misrepresentations made by or on behalf of the bank. Mr. Fakafanua has filed a counterclaim against the bank seeking cancellation of the guarantee and damages. The bank has in turn applied to strike out the counterclaim. This ruling deals with both the bank's application for summary judgment and its application to strike out the counterclaim.

The facts

[2] Mr. Fakafanua is a business man. In around 2006 Mr. Fakafanua and a company called Epic International Limited, which was controlled by one Sosaia Moehau, agreed on a joint enterprise to complete a bar and restaurant and carry on business on land owned by Mr. Fakafanua at Vuna Road, Ma'ufanga. A company called Vuna Development Limited was incorporated and arranged financed from the bank for the venture. Disagreements arose between Mr. Moehau and Mr. Fakafanua which were settled in early 2009. To implement the settlement Mr. Fakafanua's company, Faua Developments Limited, raised a loan for T$650,000 from the bank to acquire the assets and business of Vuna. Vuna in turn used this money to settle its obligations to the bank. Mr. Fakafanua was the sole director and shareholder of Faua. The bank required security to be provided for the loan to Faua which included Mr. Fakafanua's personal guarantee.

This he gave on 3 April 2009. The guarantee was limited to the sum of $100,000 plus interest, costs and expenses.

[3] Faua defaulted in making loan payments and the bank took steps to enforce its securities. On 22 January 2010 the bank served a written demand upon Faua for the balance then outstanding under the loan which was $691,067.63. That was not paid. On 17 July 2012 the bank served a written demand upon Mr. Fakafanua under his guarantee but he failed to make payment upon the demand. The amount owing by Faua to the bank as at 8 May 2014 was $749,574 (exhibit D to first affidavit of Daniel Henson) and the debt continues to accrue interest and costs incurred by the bank.

Summary judgment principles

[4] The relevant principles governing summary judgment applications are well known. *Australia and New Zealand Banking Group Limited v Civil Aviation anor* [2003] Tonga LR 281. In *Westpac Bank of Tonga v Moehau* CV 120 of 2011, 26 October 2012 Scott LCJ quoted with approval from the White Book as follows:

> The purpose of [the Rule] is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defense or raise an issue against the claim which ought to be tried. When the judge is satisfied not only that there is no defense but no

fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff (*Anglo-Italian Bank v Wells* (1873) 38 L.T. 197).

[5] The onus is on the plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defense the defendant will need to respond if the application is to be defeated. *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).

[6] It was emphasized to me in both the written and oral submissions for Mr. Fakafanua, that the Court should not normally seek to resolve conflicts of evidence or assess the credibility of witnesses on a summary judgment application. I accept that principle but note also that the Court will not accept uncritically evidence that is "*inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable*". *Krukziener v Hanover Finance Limited* [2008] NZCA 187 at [26] and *Eng Mee Yong v Letchmanan* [1980] AC 331, 341. The Court may take a robust and realistic approach when the facts warrant it. *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[7] A further point that is of particular relevance in this case is that under O15 Rule 3(1)(a) a plaintiff must file an affidavit "*verifying the facts on which the claim, or the part thereof to which the application relates, is based*" and under O15 Rule 5(2) a defendant's affidavit in opposition to an application for summary judgment "*must state clearly what the defence is, and what facts are relied upon to support it.*" The facts stated in the parties' pleadings are not evidence unless they are also set out in, or verified by, an affidavit. If they are not, the Court cannot not take them into account in determining the summary judgment application.

[8] The affidavits filed for the bank prove all of the elements of its cause of action under the guarantee. The issue is whether the plaintiff has also satisfied the onus upon it to establish that Mr. Fakafanua has no arguable defence that the guarantee was obtained by undue influence and/or misrepresentation that is worthy of going to a hearing.

Undue influence

[9] The argument that the guarantee was obtained by undue influence and/or misrepresentation was not really developed in the submissions for Mr. Fakafanua in any meaningful way; rather the focus of the submissions was that there are factual matters in dispute that make this claim unsuitable for summary judgment. It appeared to have

been assumed that the existence of factual disputes necessarily gave rise to an arguable defence of undue influence or misrepresentation.

[10] The principle allegation for Mr. Fakafanua is that Mr. Ralph Stephenson, a local lawyer who Mr. Fakafanua had instructed to act for him, also accepted instructions to act for the bank. It is said that the bank should have given Mr. Fakafanua the opportunity to get independent legal advice and also that "the plaintiff used its position and power through Mr. Stephenson to obtain the signature of the defendant" to the guarantee.

[11] Mr. Ashleigh Matheson, who was the General Manager of the bank at the relevant time, was involved with the arrangements between the bank, Faua and Mr. Fakafanua and was present when the guarantee was signed, says in his affidavit that the bank did not engage Mr. Stephenson but relied upon its in-house Counsel and that it was only subsequently that Mr. Stephenson was instructed by the bank on other matters. Apart from Mr. Fakafanua's assertion that Mr. Stephenson was acting for both him and the bank there is nothing to suggest that this was so at the time Mr. Fakafanua provided his guarantee. I am satisfied that Mr. Stephenson was not acting for the bank in relation to the advance to Faua and the taking of Mr. Fakafanua's guarantee. In any event, the defense that Mr. Fakafanua advances is built on an

unsound foundation as there is no requirement at law that a person providing a guarantee be given independent legal advice before signing it and an absence of such advice will not render a guarantee invalid. *Westpac New Zealand Ltd v Gardiner* [2013] NZHC 683 approved on appeal in *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537 and *Southland Building Society v Austin* [2012] NZHC 497. Furthermore, where, as was the case here, a guarantor deals with the bank through a lawyer the bank is entitled to assume, except in exceptional circumstances that do not apply here, that the solicitor has considered whether he has any conflicts of interest to make it necessary for him to refer the guarantor for independent advice. *Bank of Baroda v Rayarel* [1995] 2 FLR 376, 386 per Hoffmann LJ.

[12] This is not the typical sort of case that often comes before the Courts where undue influence is alleged or may be presumed due to the nature of the relationship between the borrower and the guarantor. *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. Here the borrower was Faua, a company over which Mr. Fakafanua had complete control as its sole shareholder and director. What is in issue can only be whether there was actual undue influence exerted by the bank upon Mr. Fakafanua so that he did not enter into the guarantee of his own free will. *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 165. There must be evidence of actual influence that overrides Mr. Fakafanua's will. *Bank of Credit and*

Commerce International v Aboody [1990] 1 QB 923 (CA). There is nothing in Mr. Fakafanua's affidavit to suggest that undue influence was brought to bear upon him to sign the guarantee. He is an experienced businessman with substantial and valuable assets. Nowhere, does he say in his affidavit that he felt pressured to sign the guarantee. I note that in the statement of defense it is alleged that Mr. Stephenson did not explain the contents of the guarantee to Mr. Fakafanua and that due to gout he was "*not well to apprehend the provision of the guarantee*" but there are no statements to that effect in his affidavit and in any event these allegations are not evidence of undue influence by the bank. The guarantee was given only after Mr. Stephenson had successfully negotiated a limit on it of $100,000, contrary to the bank's usual lending requirements, and the transaction of which the guarantee was part was manifestly advantageous to Mr. Fakafanua in that resolved his dispute with Epic and Mr Moehau.

[13] For these reasons I am satisfied that Mr. Fakafanua's defense of undue influence has no prospect of success.

Misrepresentation

[14] The other defense advanced is that Mr. Fakafanua was induced to enter into the guarantee by misrepresentations made by Mr. Stephenson on behalf of the bank. In the circumstances of this case

there is nothing to displace the ordinary rule that a solicitor advising a guarantor does so exclusively as the guarantor's solicitor. *Midland Bank plc v Serter* [1995] 3 FCR 711; *Halifax Mortgage Services Ltd v Stepsky* [1996] 2 All ER 277. *National Westminster Bank plc v Breeds* [2001] Lloyds' Rep Bank 98. If Mr. Stephenson had misled Mr. Fakafanua then he was acting as Mr. Fakafanua solicitor and not as the solicitor for the bank. Mr. Fakafanua's remedy (if any) is against Mr. Stephenson and not the bank.

[15] More fundamental than that, there is in my view no evidence of any misrepresentations in any event. Mr. Pouono advised me that the misrepresentations relied upon are set out in paragraphs 11, 14, 15, 16 of Mr. Fakafanua's affidavit. Paragraphs 11 and 14 contain no allegations that Mr. Stephenson misled Mr. Fakafanua. Paragraphs 15 and 16 allege that Mr. Stephenson told Mr. Fakafanua that he could expect to pay interest on the loan of $6,000 to $7,000 and the loan repayments were in fact $8,000, yet the terms of the loan agreement (exhibit A to the affidavit of Daniel Henson) that Mr. Fakafanua signed show that the loan repayments were, consistent with what Mr. Stephenson is alleged to have said, initially $6,700 per month and were only to increase to $8,100 per month after 6 months. Mr. Fakafanua does not allege in his affidavit that he did not read the loan agreement or that did not understand its terms when he signed it so he must have known what the repayment terms were to be.

[16] Furthermore, the conditions of the loan agreement and Mr. Fakafanua's personal guarantee, both contain terms excluding any liability that the bank might have for misrepresentation. The loan terms state that in entering into the loan agreement the borrower "*has not and does not rely on any representation or advice given by the Bank howsoever arising but relies on his own judgment in doing so*" and that the borrower "*was advised by the Bank to obtain independent advice....and absolves the Bank from any liability for any misrepresentation or negligent advice made by the Bank, its officers, employees, agents or servants*". (page 7 of the terms and conditions attached as exhibit A to affidavit of Daniel Henson). Paragraph 17 of the guarantee provides, to similar effect, that "*the Guarantor does not execute this instrument as a result of or by reason of any promise representation statement or information of any nature or kind whatsoever given or offered to him by or on behalf of the Bank...*". No submissions were advanced that Faua and Mr. Fakafanua were not bound by these terms.

[17] Before leaving this topic, I note that Mr. Stanton's written submissions focused on matters set out in paragraphs 24 to 27 of Mr. Fakafanua's statement of counterclaim. I do not see that these paragraphs contain allegations of misrepresentations but, to the extent that they do, there is no sufficient evidential foundation for them in Mr. Fakafanua's

affidavit. It appears that what is being alleged is that Mr. Fakafanua received inadequate advice from Mr. Stephenson in which case his remedy is against Mr. Stephenson and not the bank. In any event, the terms of the loan agreement and guarantee, to which I have referred above, preclude any claim against the bank in reliance on such matters.

[18] For these reasons I am satisfied that Mr. Fakafanua's defense of misrepresentation has no prospect of success.

The counterclaim

[19] The crucial allegations for present purposes are paragraphs 28 and 29 of the statement of counterclaim which allege that the bank and Mr. Stephenson took advantage of Mr. Fakafanua "*in order to induce him to enter the said loan*" and that the bank "*took advantage of the defendant through their counsel, who was acting for both parties*". I presume that the reference to "*the said loan*" was meant to read "*the said guarantee*" because the prayer for relief seeks an order for the cancellation of the guarantee not the loan. In truth the counterclaim is a defense to the bank's claim on the guarantee. It cannot survive my finding that the Mr. Fakafanua has no defense to the bank's claim on the guarantee and must be struck out.

The result

[20] I am satisfied that Mr. Fakafanua has no defense to the bank's claim. Judgment is entered in favour of the bank and against Mr. Fakafanua in the sum of $100,000 plus interest as claimed at the rate of 10.65% per annum from 17 July 2012 (being the date of demand under the guarantee) to the date of payment.

[21] Mr. Fakafanua's counterclaim is untenable and in light of my findings above cannot proceed. It is struck out.

[22] The plaintiff is awarded costs of the proceeding to be fixed by the registrar if not agreed.

SUPREME COURT TONGA

O.G. Paulsen

DATED: 7 September 2015. **LORD CHIEF JUSTICE**