IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0007 OF 2004S
(High Court Civil Action Nos. 175 of 2001 and 535 of 2000S)

BETWEEN:

MARY MARAIA PETERSEN HEWITT

First Appellant

ARTHUR LORD

Second Appellant

AND:

HABIB BANK LIMITED

Respondent

Coram: Barker, JA
Tompkins, JA
Scott, JA

Hearing: Monday, 22 November 2004, Suva

Counsel: Mr. S. Valenitabua for the Appellants
Mr. B. Narayan for the Respondent

Date of Judgment: Friday, 26 November 2004

JUDGMENT OF THE COURT

In 1981 the first Appellant (Mrs Hewitt) went to live in Papua New Guinea. In 1987 she purchased a property at Namadi Heights and let it out. Unfortunately, she experienced difficulty in collecting the rent.

In 1991 Mrs Hewitt agreed that John Low, a close family friend, would manage the property for her. She wrote to Mr Low in October 1991 confirming the arrangement and also informed her then solicitors, Messrs Q.B. Bale and Associates.

In January 1992 a power of attorney granted by Mrs Hewitt to Mr Low was lodged by Messrs Tevita Fa and Associates, solicitors. Its terms are very wide. The powers include:

> "Clause (6): to manage carry on and superintend any business or undertaking which I may carry on or in any way be interested in whether solely or in partnership with others.
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> Clause 10: to borrow from time to time such sum or sums of money as my attorney may think expedient upon the security of any of my property whether real or personal or otherwise and for such purposes to give execute and make such mortgages charges pledges bonds or other securities and with such covenants powers and provisions as my attorney may deem advisable.
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> Clause 12: to enter into make sign seal execute deliver acknowledge and perform any contract agreement deed writing or thing that may in the opinion of my attorney be necessary or proper to be entered into made signed sealed executed delivered acknowledged or performed for effectuating the purposes in these presents contained in any of them.
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> Clause 13: In my name and on my behalf to operate on any banking account or accounts and for the purpose to sign draw accept or endorse cheques promissory notes bills of exchange and other negotiable instruments and also to make fixed or temporary deposits in any bank in the name of my attorney or in my name and to withdrew the same at will.
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> Clause 17: Generally to do execute and perform any other act deed matter or think whatsoever which ought to be done executed or performed or which in the opinion of my attorney ought to be done executed or performed in or about my property concerns engagements and business of every nature and kind whatsoever as fully and effectually to all intents and purposes as I

myself could do if I were present and did the same in my proper person it being my intent and desire that all matters instruments and things respecting the same shall be under the full management and direction of my attorney."

Mrs Hewitt signed the power of attorney. It was countersigned by a notary public who certified that its contents had been read over and explained to Mrs Hewitt who fully understood its meaning and effect.

On 24 January 1996 Mr Low and Mrs Hewitt registered a business name. According to the declaration the business, which was a fast-food business called "the Charcoal Chicken, began operating on 25 September 1995. Mrs Hewitt signed the necessary form and described herself as a business woman.

In April 1998 two sums, together totalling $146,000 were placed on 36 months interest-bearing deposit with Respondent, Habib Bank Limited ('the Bank') to the account of Mrs Hewitt. Mrs Hewitt's evidence was that she did not know who had deposited this money into her account and that she did not know how many accounts she had with the Bank.

In September 1998 the Charcoal Chicken sought an enhancement of its current overdraft and loan facility with the Bank. The request was approved after the Bank's solicitors had received copies of a certificate of title and the power of attorney granted by Mrs Hewitt to Mr Low. In its letter of approval sent to the partners of the Charcoal Chicken, the Bank advised that its security for the loan of $150,000 included a first registered mortgage over residential property CT14498 (owned by Mrs Hewitt) and liens over the two fixed deposits held by it in her name.

On 20 November 1998, the Charcoal Chicken was incorporated as a limited company named Charcoal Chicken Limited. The two directors were Mr Low and Mrs Hewitt. The company's banker was the Bank.

In August 1999 the Bank agreed to enhance the loan and overdraft facility which was now enjoyed by Charcoal Chicken Limited. The total sum agreed was $250,000. According to the letter of acceptance, the securities included those already held, with the addition of bills of sale over three vehicles.

On 17 August 1999 Mr Hewitt and Mr Low executed a number of security documents. They did so at the offices of Khan and Company, Barristers and Solicitors. The documents included a debenture over the property of Charcoal Chicken Limited, a mortgage over Mrs Hewitt's property at Namadi Heights, a Bill of Sale over two motor vehicles and unlimited guarantees by Mrs Hewitt and Mr Low. A copy of a resolution of the board of directors of Charcoal Chicken Limited agreeing to provide the Bank with the securities was also signed by Mrs Hewitt and Mr Low.

Unfortunately, Charcoal Chicken Limited was not able to make repayments of the loan at the rate required. Finally, on 27 November 2000 notices of demand seeking repayment of $199,654.63 was sent to Charcoal Chicken Limited, Mrs Hewitt and Mr Low. The demand was not met.

In November 2000 Mrs Hewitt commenced proceedings against the Bank (HBC535/00). She alleged negligence and breach of fiduciary duty. She sought damages and a declaration that the security documents signed by her on 17 August 1999 were null and void. The Bank filed a defence denying Mrs Hewitt's claim. It denied departing from normal banking practice and stating that the meaning and effect of the security documents had been explained to Mrs Hewitt by the Bank's solicitor when she signed them. It suggested that, if Mrs Hewitt had a cause of action, it was against Mr Low and not against the Bank.

In April 2001, the Bank commenced its own proceedings (HBC175/01) against Charcoal Chicken Limited, Mrs Hewitt and Mr Low. Its sought repayment of $215,238.00 being the amount than owed by the defendants to the Bank.

In September 2001 the two actions were consolidated. They came on for trial before the High Court (Singh J.) in October 2003. According to the minutes of the pre – trial conference filed in January 2002, the principal issues were whether Mrs Hewitt was bound by the security documents executed by her and whether the Bank had acted negligently or in breach of its fiduciary duty owed to Mrs Hewitt.

The evidence before the High Court was quite brief. Mrs Hewitt, her brother Arthur Lord, the second appellant and a bank officer were the only witnesses.

Mrs Hewitt's case, put shortly, was that she had nothing to do with the operation of Charcoal Chicken or with Charcoal Chicken Limited, that Mr Low did not tell her that he had formed a company, that she did not know that a lien had been taken by the Bank over her fixed deposit accounts and that, although she had signed the security documents, she did so without knowing what she was signing; she simply did what John Low told her to do. In cross-examination she maintained that she did not know what a guarantee was, nor a mortgage. She knew that she was signing business documents but had "no urge" to ask what they were.

Having heard and seen Mrs Hewitt, the High Court rejected her central claim. The Judge found that he did not believe that Mrs Hewitt was totally ignorant of the documents she was signing. On the contrary, he found that Mrs Hewitt had signed the documents after they were explained to her and that she knew that they related to the business of Charcoal Chicken Limited. In these circumstances her plea of non est factum failed.

The High Court also rejected Mrs Hewitt's claim that the Bank acted negligently or in breach of its fiduciary duty to her. The Judge held that the Bank was entitled to rely on the power of the attorney held by Mr Low. He held that there was nothing to suggest that the commercial arrangements entered into were not intended to be for Mrs Hewitt's benefit and that there was no other reason to put the Bank on enquiry. He concluded that Mrs Hewitt could not "extricate herself from the arrangements and contracts put in place by her holder of the power of attorney from her and who was also her [business] partner. "

Mr Valenitabua argued three grounds of appeal. The first was that the High Court was wrong to reject Mrs Hewitt's defence of non est factum. The second was that the High Court erred in not finding that the authority given by Mrs Hewitt to Mr Low was limited to the authority to manage her rental property for her. The third was that the High Court erred in not finding that the Bank had breached its fiduciary duty to Mrs Hewitt.

The initial difficulty in the first ground of appeal is that the burden of showing that the trial Judge was wrong in his findings on the facts lies on the appellant. Unless an appeal court is satisfied that the Judge was wrong in his assessment of the facts, the appeal will be dismissed. (***Colonial Securities Co. v. Massy***) [1896] 1 QB 38,39. Where a primary Judge's estimation of the credibility of a witness forms a substantial part of the reasons for the judgment, the conclusions of fact will almost invariably be left alone (***Powell v. Streatham Manor Nursing Home***) [1935] AC 243. As has been seen, in the present case, the Judge who saw and heard Mrs Hewitt simply did not believe that she did not know what she was doing when she signed the security documents. This is a conclusion with which we are not ready to interfere.

The second difficulty is that it is settled law in Fiji that a defence of non est factum will not lightly be allowed when a person of a full age and capacity has signed a written document embodying contractual terms (***Fiji Development Bank v. Raqona*** (1984) 30 FLR 151). The general rule is that a party of full age and understanding is bound by his/her signature to a document whether he/she reads or understands it or not. (See ***Gallie v. Lee*** [1971] A.C. 1004, 1016,1019) We see no reason to depart from this rule in this case and therefore the first ground of appeal fails.

As has been noted, the power of attorney was in very wide terms. It included a clause 13 which specifically permitted Mr Low to enter into banking arrangements on Mrs Hewitt's behalf. Mr Valenitabua argued that the letter of October 1991 somehow limited the scope of the authority ostensibly conferred on Mr Low by the power of attorney.

In our view this argument is unsustainable first, because in case of doubt powers of attorney are construed against the grantor and, secondly, because in the absence of ambiguity, not here present, extrinsic evidence that the donee was not intended to have the powers contained in the deed of appointment is not admissible (See *Bowstead on Agency* 15th Ed. Article 24). In any event, there is nothing to show that the Bank was aware of the letter and therefore it was entitled to take the power of attorney at face value. The second ground of appeal fails.

The final submission was that the Bank owed Mrs Hewitt a fiduciary duty, at least in regard to the fixed deposits. Mr Valenitabua suggested that since the Bank had undertaken to return the sum deposited by Mrs Hewitt at the end of the deposit period, it had assumed a responsibility to ensure that the deposits were not imperilled by unwise actions on her part.

Mr Valenitabua referred us to two Canadian cases as authority for the proposition that "Where there was a long history of dealing between the customer and the financier and it was shown that the customer placed reliance on the financier" a fiduciary relationship arose. We were not supplied with copies of the judgments in these cases.

While an advisory relationship between a particular customer and a bank may be such that fiduciary duties and duties of care may arise (see ***Woods v. Martins Bank Limited*** [1959] 1 QB 55;[1958] 3 All 166), there is no evidence in this case that such a relationship between Mrs Hewitt and the Bank ever arose. Indeed, it was admitted by Mr Valenituabua that Mrs Hewitt had never actually dealt directly with the Bank herself. There is nothing to suggest that she ever sought its advice on any investments that she proposed to make or that she relied on the advice given by the Bank to her detriment. If Mrs Hewitt had met her obligations to the Bank in respect of Charcoal Chicken's current and loan accounts, then the fixed deposits would have been repaid on demand at the end of the deposit period. As it turned out however, she failed to respond to the Bank's demand and, therefore, the fixed deposits became available to the Bank under its right of combination. The third ground of appeal also fails.

Result

1. The appeal is dismissed.

2. The respondent is entitled to its costs which we fix at $750.00.

R.J. Barker

Barker, JA

Tompkins, JA

FIJI COURT OF APPEAL

Scott, JA

Solicitors:

Valenitabua S.R. Esq. Suva for the Appellants
Messrs Lateef and Lateef, Suva for the Respondent