IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY APPEAL NO. AC 25 of 2009

BETWEEN : 1. KESOMI 'AUKAFOLAU
2. MELE SANILAITI 'AUKAFOLAU

Appellants

AND : ANZ BANKING GROUP LTD

Respondent

Coram : Burchett J, Salmon J, Moore J

Counsel : Mrs Taufaeteau for the Appellants
Mrs Tupou for the Respondent

Date of Hearing : 5 October 2010

Date of Judgment : 8 October 2010

JUDGMENT OF THE COURT

[1] The appellants were husband and wife during the period to which this appeal relates. In a judgment of 1 May 2009, Andrew J gave judgment against both of them in the sum of $93,736.75 plus interest at 15% from 2 October 2008. Their liability was joint and several. His Honour also gave judgment against the second appellant in the sum of $8,806.96 and interest on the same terms.

[2] The judgment against both of them related to a housing loan which had been made by the ANZ Banking Group Ltd ("ANZ"). The judgment against the second appellant alone arose from a personal loan which had been made to her by the bank. Before turning to the issues raised before Andrew J and on appeal, it is convenient to set out facts not in dispute.

[3] The second appellant owned a house which burnt down in 2007. At that time the house was the subject of a loan agreement (secured by a mortgage) and it was insured with Federal Pacific Insurance Ltd ("Federal Pacific"). The insured was the second appellant. The ANZ was, for the purposes of the insurance policy, an interested financial party. The policy provided that Federal Pacific had to make payment to an interested party when a claim was settled. When the house burnt down, Federal Pacific paid ANZ $68,712 in satisfaction of the second appellant's claim under the policy. This was an entirely orthodox and appropriate thing for Pacific Insurance to have done having regard to the terms of the policy. This payment satisfied all but $4,532.00 owing under the loan agreement.

[4] On 8 May 2007 both appellants signed a loan agreement with the ANZ in the sum of $76,665 made up of additional funds of $68,712 to rebuild the house destroyed by fire and $7,953 then outstanding from the earlier loan. The loan arising from the May 2007 agreement was secured by a registered mortgage.

[5] On 15 January 2008 a further loan agreement with the ANZ was signed by both appellants. By that agreement the ANZ advanced the appellants a further amount of $4,200 in addition to the $81,751 then owing under the earlier agreement. Accordingly the January 2008 agreement concerned a loan totalling $85,951. Again the loan was secured by a mortgage.

[6] On 28 April 2008 the second appellant (but not the first appellant) signed a further loan agreement. It concerned a personal loan of $7,500 and a housing loan of $87,986 being the total amount owing under the January 2008 agreement.

[7] In the proceedings before Andrew J, the ANZ sought to enforce the loan agreements as the appellants were in arrears and in breach of the agreements. In its pleadings the ANZ framed its case on the basis that the underlying loan agreement was the agreement of 8 May 2007 and the execution of the loan agreements in January and April 2008 were variations of the May 2007 agreement. With one qualification we mention in a moment, this appears to us to be an appropriate legal framework for determining the rights and obligations flowing from the agreements signed by the parties.

[8] The appellants defended the ANZ's claim on the basis that "they had no choice [but to deal with the ANZ]" and this constituted economic duress. The first appellant also advanced a defence that the final loan agreement of 28 April 2008 had not been signed by him. The trial judge rejected the economic duress argument on the basis that there was no viable evidence of economic duress. His Honour rejected the defence of the first appellant concluding that the failure to have him named in the agreement and have him execute the agreement was an oversight.

[9] In the appeal, the appellants did not refer to any evidence which would put in doubt the trial judge's conclusion rejecting the claim of economic duress. Much more than the events of 2007 as we have summarized them would be needed to sustain a finding of economic duress. The principles were discussed in the decision of the Court of Appeal in *Bank of Tonga v Tulikihakau* [1999] Tonga LR 182.

[10] In relation to the contention that the first appellant is not liable because he did not sign the April 2008 loan agreement, we consider the more satisfactory analysis is to say that he is liable under the agreements he did sign (in May 2007 and January 2008) for precisely the same amount (being the loan amount together with interest and charges but not including the amount of the personal loan) as he would have been had he executed the loan agreement in April 2008.

[11] Accordingly no occasion arises for the Court to consider making an order of rectification in relation to the April 2008 agreement and the ANZ's application to amend its statement of claim in order to raise this issue in the appeal is refused.

[12] We have not overlooked the written submissions of the appellants referring to *Collier v P & M Wright (Holdings) Ltd* [2008] 1 WLR 643 *Stilk v Myrick* (1809) 2 Camp 317 and other cases but, in our opinion, those cases have no relevance to the facts of this case.

[13] The appeal is dismissed with costs.

.....
Burchett J

COURT OF APPEAL TONGA

.....
Salmon J

.....
Moore J