IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **APPEAL NO. AC 20 of 2010**

BETWEEN : **HA'APAI MARINE LIMITED.**

Appellant

AND : **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED.**

Respondent

Coram : **Burchett J**

Salmon J

Moore J

Counsel : **Mr. Pouono for the Appellant**
By leave Appellant represented by its Managing Director Mr. Tofa on 13 April, 2011

Mrs. Tupou for the Respondent

Date of Hearing : **12 – 13 April, 2011**

Date of Judgment : **15 April, 2011**

JUDGMENT OF THE COURT

[1] This is an appeal from a judgment of Andrew J on 11th August 2010 in which the respondent's claim for TOP$50,077.0 plus interest was allowed and the appellant's claim for damages for breach of fiduciary duty was dismissed.

[2] At the commencement of the appeal Mr Pouono appeared for the appellant. He applied for an adjournment which we refused. He then tabled a letter from the appellant discharging him as counsel. Mr Tofa then sought permission to act on behalf of the appellant. We granted that request. He also sought an adjournment which we refused but we deferred the case until the following morning to give him time to undertake some preparation. In the event he was able very clearly and forcefully to put to us the matters in respect of which he considered the judge in the Court below had erred.

[3] We are now able to address the two claims made by the appellant and determine this appeal.

[4] The appellant borrowed TOP$25,000 from the respondent Bank in October 2000. The purpose of the loan from the appellant's point of view was to repay money owing to the Tonga Development Bank so that it would release a charge over the MV Vaomapa which was then owned by interests of Mr Tofa's. The intention was to transfer ownership to the appellant although in fact this never happened. The money borrowed was also intended to provide working capital for the company. As security for the loan the bank took a debenture over the assets of the appellant, a mortgage over Mr Tofa's house and personal guarantees

from the directors of the company. There is no reference in the documentation to the MV Vaomapa. The documents record the purpose of the loan as "working capital and refinance of Tonga Development."

[5] On the 19th November 2000 the Bank lent a further TOP$20,000 to the appellant the purpose of which is recorded as "For payments associated with insurance of main boat 'Vaomapa'."

[6] On 19th November 2001 the Bank lent TOP$26,300 to the appellant bringing total indebtedness to $33,833.00. The purpose was said to be to restructure the current overdraft into a term loan facility. Finally on 28th September 2004 an additional TOP$5000.00 was lent bringing total commitments to TOP$51,963.00. The purpose of the further $5,000 was said to be "Purchase of sandalwood/copra."

[7] In the Court below the appellant did not challenge the quantum of the amount owing to the respondent, which, by the time proceedings were issued, was TOP$50,077.00. The appellant raised two issues. First it claimed that the contract had been frustrated because the ship had been totally destroyed in a storm. The appellant maintained that the purpose of the loan was to enable it to purchase the vessel and later to insure it and that the destruction of the vessel destroyed the purpose of the contract. Secondly the appellant claimed that the respondent had breached its fiduciary duty to the appellant by disclosing confidential information to a party with whom the appellant was in business negotiations thus destroying the possibility of the enterprise succeeding. Both of these claims were rejected by the judge.

Frustration of Contract

[8] A classic example of the application of the doctrine of frustration of contract is *Taylor v Caldwell* [1863] 3B&S826. In that case there was an agreement to allow the use of a music hall for certain specified days for the purpose of holding concerts. The hall was destroyed by fire and the hirer of the hall claimed damages for breach of contract. Blackburn J discharged the contract on the basis that its fulfilment depended on the existence of the hall and the parties must have understood that its continuing existence was the foundation of the bargain.

[9] The modern approach to frustration is that in circumstances such as those described above the court imposes upon the parties the just and reasonable solution that the new situation demands. Speaking of an event and whether it would lead to frustration of contract Lord Wright said in *Denny Mott & Dickson Ltd. v James Fraser & Co. Ltd.* [1944] AC 265 at 276:

> "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is a matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'."

[10] In the present case there is no doubt about the event relied on by the appellant. It was the destruction of the vessel by weather conditions over which it had no control. The problem for the appellant is that the continued existence of the vessel cannot be said to have been regarded as essential by both parties to the performance of the contract. This was a contract for the loan and repayment of money. The obligations on the parties were that the Bank would provide the money and the appellant

would repay it in the manner required by the contract. The assets of the company including the boat were part of the security to which the Bank could have recourse in the event of failure to undertake the obligation of repayment. The circumstances are no different to an agreement to lend money which is used to buy a house or a car or any object over which security may also be taken. In none of these cases does the destruction of the object, no matter what the cause, result in frustration of the contract because its continued existence is not fundamental to the contract which is concerned just with repayment of the money lent. The contract was not frustrated by the loss of the vessel and the appeal must fail in that respect.

The Respondents fiduciary obligations

[11] The appellant claimed US$210,000 for breach of fiduciary duties. The allegation is that the bank leaked confidential information regarding the appellant's loan status to a potential purchaser of copra from the appellant and that the buyer later cancelled the arrangement. The evidence supporting this allegation consisted of an email from the potential purchaser which included the statement *"I have been talking to the bank and it appears you have a problem there but we are working our way around it"* The email goes on to point out the importance of a frank exchange of information regarding obligations to the bank. The appellant's response was to write to the bank complaining about the bank's disclosure but going on to authorise it to give the prospective purchaser the information he requested concerning the debt by the appellant to the Bank.

[12] The above evidence falls far short of providing the necessary nexus between the supply of information (and there was no evidence of what the Bank actually said) and the eventual failure of the proposed contract to proceed. Nor was there any sufficient evidence to establish the loss said to have been incurred. In these circumstances the claim was properly dismissed.

[13] For the above reasons the appeal is dismissed. The respondent is entitled to its costs of the appeal.

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Burchett J

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Salmon J

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Moore J