

IN THE SUPREME COURT OF NEW ZEALAND

SC 51/2014  
[2014] NZSC 89

BETWEEN FORIVERMOR LIMITED  
Applicant

AND ANZ BANK NEW ZEALAND LIMITED  
(FORMERLY ANZ NATIONAL BANK  
LIMITED)  
Respondent

Court: Elias CJ, McGrath and Glazebrook JJ

Counsel: G J Thwaite for Applicant  
C T Walker for Respondent

Judgment: 10 July 2014

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JUDGMENT OF THE COURT

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- A The application for leave to appeal is dismissed.**
- B The applicant must pay to the respondent costs of \$2,500.**
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REASONS

[1] Forivermor Ltd, a company owned by Mr and Mrs Morley, applies for leave to appeal against a judgment of the Court of Appeal<sup>1</sup> dismissing its appeal against the rejection by the High Court<sup>2</sup> of its claim for damages against ANZ Bank New Zealand Limited.

[2] The background is that, in August 2008, the applicant sought funding from the respondent to finance the purchase of a farm adjacent to one which Forivermor already owned. The purchase price for the land and associated Fonterra shares was

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<sup>1</sup> *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129.

<sup>2</sup> *Forivermor Ltd v ANZ National Bank Ltd* [2012] NZHC 1763.

\$7,298,928 plus GST. The Bank agreed to advance to the applicant \$2,167,000 plus bridging finance, which would cover the deposit. Morley family interests were to contribute one million dollars. Forivermor's proposal also required Forivermor to contribute \$4,300,000 from the planned sale of a 57ha part of its existing farm. Settlement of the purchase was to take place in May 2009.

[3] Discussions took place between the Morleys, their solicitor and the Bank, over whether the Bank would cover the applicant if its land did not sell in time, or for enough. The applicant then committed itself to an unconditional contract for the purchase. Prior to settlement market prices for dairy farms fell and the applicant was unable to sell part of its existing farm, as it had envisaged. Eventually the applicant sold the whole farm for \$3,300,000. This price necessitated further loan financing for the purchase. The Bank, however, refused to provide it. The applicant did not settle the purchase and the vendors cancelled the contract.

[4] The applicant sued the Bank. Its causes of action were breach of contract, misrepresentation, breach of contract based on the Code of Banking Practice, negligence, breach of fiduciary duty, breach of the Fair Trading Act 1986 and breach of the Consumer Guarantees Act 1993. The central theme of the applicant's case was that, prior to the applicant making its contract to purchase the new farm unconditional, the Bank had warranted that it would provide funding to the full extent required to complete the purchase, whether or not the applicant was able to sell the 57ha of its farm by settlement. Subsidiary contentions included claims by the applicant that the Bank had advised and encouraged it to enter into the agreement to buy the farm, including suggesting the purchase.

[5] In its application for leave, the applicant contends that the proposed appeal raises issues of public importance or general commercial significance in relation to the legal status of the NZ Code of Banking Practice. A particular issue would be whether, as a matter of bank trading practice and custom, the terms of the Code had been incorporated into the finance contract entered into with the applicant. It also contends that the legal effect of standards for lending practices, promulgated to customers by the Bank, and other banks, raises questions of general commercial significance because of the predominant position of banks in relation to customers.

[6] The main difficulty for the applicant in its application for leave to appeal to this Court is that both Courts below have rejected the factual contentions that are central to the applicant's claims. The Court of Appeal found that the Bank's loan offer was accepted by the applicant on its terms, not subject to any oral amendment or assurance.<sup>3</sup> This made the Bank's obligation dependent on the applicant making the contribution specified in its proposal. Findings of fact adverse to the applicant were also made in respect of discussions between the Bank's officers and the solicitor acting for the applicant during the period between the Bank making its offer and the applicant making the contract unconditional.<sup>4</sup>

[7] We are satisfied that this proceeding was effectively determined by the findings of fact in both Courts against the applicant. The Court is not prepared to revisit those concurrent findings. There is accordingly no sound basis for the legal grounds which the applicant wishes to address.

[8] Accordingly we are not satisfied that it is in the interests of justice to grant the application for leave to appeal and the application is dismissed.

Solicitors:  
Gilbert/Walker, Auckland for Respondent

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<sup>3</sup> *Forivermor Ltd v ANZ Bank New Zealand Ltd*, above n 1, at [24].

<sup>4</sup> At [14]–[17] and [30]–[31].