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ANZ National Bank Limited v Hussain AA34A/10 [2010] NZERA 590 (29 July 2010)

Last Updated: 3 November 2010

Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 34A/10 5123622

BETWEEN ANZ NATIONAL BANK

LIMITED Applicant

AND ZAMIR HUSSAIN

Respondent

Member of Authority: Robin Arthur

Representatives: Andre Lubbe for Applicant

No appearance for Respondent

Investigation Meeting: 27 July 2010

Determination: 29 July 2010

DETERMINATION OF THE AUTHORITY

[1] By determination AA34/10 (28 January 2010) the Authority found Zamir Hussein had repeatedly breached the credit risk policy of ANZ National Bank Limited (the Bank) in his work as a mobile mortgage manager. This involved situations where he recommended unconditional approval of mortgage applications which were later found to be part of an elaborate scheme by borrowers who then defaulted on those loans and whose activities have since been referred to the Serious Fraud Office.

[2] The Authority found Mr Hussain caused losses to the Bank by failing to exercise proper diligence in carrying out his duties in dealing with those applications. Determination AA 34/10 set out the evidence on the inadequacies of the documentation which he had accepted in processing loan applications and recommending their approval.

[3] Mr Hussain's training and experience was such that he must have known of the real prospect of significant losses being caused by his careless or reckless actions. Accordingly the Authority found Mr Hussain was liable for losses incurred by the Bank in respect of 18 transactions identified in the evidence.

[4] The Bank had not quantified the full extent of its losses at the time of the Authority's earlier investigation. Leave was reserved for further investigation to quantify and determine damages.

[5] The Bank has now lodged an application seeking an award of damages of NZ\$1,282,051. While evidence for the Bank states its actual damages exceed that amount, the Bank decided to 'cap' its damages claim. The level of damages sought is up to the value of the excess for which the Bank would be liable under an insurance policy that would apply if criminal convictions were secured for the fraudulent activity that had resulted in the loss.

[6] Mr Hussain has not responded to this application. He received the earlier determination on his liability via an email address he had provided in Brisbane. Shortly afterwards he advised the Authority of a new email address at which he would be "contactable", his intention to move to London on 7 February 2010, and his intention not to return to New Zealand or

Australia ""/Or at least three years".

[7] The Bank's current application, its submissions and its evidence on the quantification of damages were sent to Mr Hussain at the new email address he gave as his point of contact. He had adequate opportunity to respond, but did not do so. Arrangements were made for an investigation to be scheduled and notified to the parties. Mr Hussain was also offered the opportunity to participate in that investigation by telephone or video conference but did not respond to that proposal.

[8] In the absence of response or evidence from Mr Hussain I have proceeded to investigate and determine damages, satisfied he has been notified of the prospect and had adequate opportunity to participate.[\[1\]](#) **Order prohibiting publication**

[9] The Bank's evidence on quantification of loss refers to the names of the three borrowers and the addresses of seven properties purchased with bank mortgage loans. Publication is prohibited of the names of those borrowers and the addresses of the properties.[\[2\]](#): clause 10 of Schedule 2 of the Employment Relations Act. This determination refers instead to Borrower A, Borrower B and Borrower C and identifies the properties by suburb only.

[10] The order is made to protect commercially sensitive information of the Bank and information regarding borrowers who might yet be subject to criminal proceedings. The pleadings and evidence are to be sealed in the Authority file. Any person with a legitimate interest may apply to see those documents and the parties will have an opportunity to make submissions before an Authority member decides on access to the file.

Legal principles

[11] The Bank submits there is no prospect of mitigating its losses by further contribution from the three defaulting borrowers as each one was adjudged bankrupt last year.

[12] Instead the Bank seeks an award against Mr Hussain, relying on the principles governing such awards as summarised in *Medic Corporation v Barrett (no 2)*.[\[3\]](#)

[13] I accept the principles of law set out in that judgment apply to the facts of this case as the losses suffered by the Bank would probably not have ensued but for Mr Hussain's conduct and should be the subject of an award of special damages. The particular types of losses suffered by the Bank were reasonably foreseeable as a consequence of Mr Hussain breaching his particular duties as mobile mortgagemanager to properly verify documentation before recommending loan approvals.[\[4\]](#)

Quantification of damages

[14] I accept the Bank is entitled to seek an award of damages for the following types of losses:

- (i) The difference between what the Bank lent to the borrowers and what it later realised in mortgagee sales of the properties; and
- (ii) Interest on the money lent from the time when the mortgagor first defaulted until the time of the mortgagee sale; and
- (iii) Legal costs and other expenses relating to defaults on the loans and arranging mortgagee sales.

[15] The third element included marketing costs, auctioneers' fees, legal fees to settlement, service of Property Law Act notices in the process necessary to take possession of the properties, payment of GST on sales of the properties, payment of indemnity insurance on the properties once repossessed and payment of outstanding local authority rates.

[16] The Bank's evidence of its losses was given by way of affidavit from its fraud investigator Trudie Smith. That evidence dealt with losses arising from just seven transactions of the 18 transactions for which Mr Hussain was earlier found liable. Those seven transactions saw money lent to three borrowers purchasing seven North Shore properties and resulted in losses to the Bank - of the three types identified above - totalling \$1,668,018.

[17] Borrower A got loans of \$511,000 to buy a Birkdale property and \$760,000 to buy a Chatswood property. The mortgagee sales of those properties generated \$835,000. After deduction of legal and other sale expenses, the loss to the Bank on those transactions totalled \$621,621.

[18] Borrower B got a loan of \$995,200 to buy a Paremoremo property which generated \$670,000 at mortgagee sale. After deduction of legal and other sale expenses, the loss to the Bank on that transaction totalled \$440,429.

[19] Borrower C got loans of \$420,000 to buy a Beachhaven property and \$796,000 to buy a Rothesay Bay property. The mortgagee sales of those properties generated \$756,000. After deduction of legal and other sale expenses, the loss to the Bank on those transactions totalled \$605,968.

Orders

[20] Mr Hussain is ordered to pay \$1,282,051 to the Bank as special damages for losses caused by his conduct.

Costs

[21] The Bank seeks an order for costs of \$4000. While it has been represented throughout by in-house counsel, an award of costs may be made and is, I find, appropriate and modest in light of the extensive efforts required to advance the claims on liability and damages and also respond to an unjustified dismissal allegation made by Mr Hussain but never pursued. Mr Hussain is to pay \$4000 as a reasonable contribution to the Bank's costs.

Robin Arthur
Member of the Employment Relations Authority

[1] Clause 12 of Schedule 2 of the [Employment Relations Act 2000](#) ("the [Act](#)").

[2] Clause 12 of Schedule 2 of the [Act](#).

[3] [1992] NZEmpC 251; [1992] 3 ERNZ 977 (EC, Goddard CJ) at 983 and following.

[4] *Attorney-General v Gilbert* [2002] NZCA 55; [2002] 2 NZLR 342, 361-362 (CA).

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