IN THE COURT OF APPEAL OF NEW ZEALAND

CA790/2012
[2014] NZCA 129

BETWEEN	FORIVERMOR LIMITED Appellant
AND	ANZ BANK NEW ZEALAND LIMITED (FORMERLY ANZ NATIONAL BANK LIMITED) Respondent

Hearing: 11 March 2014

Court: Harrison, White and Venning JJ

Counsel: G J Thwaite for Appellant
C T Walker and A T B Joseph for Respondent

Judgment: 7 April 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs on a band A basis with a 50 per cent uplift plus usual disbursements.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] The appellant, Forivermor Ltd (Forivermor), a company owned by Stuart and Joanne Morley (Mr and Mrs Morley), owned a successful dairy farm in Manawaru. The farm was financed with loans from the respondent, ANZ National Bank Limited (the ANZ).

[2] On 3 September 2008 Forivermor entered into an agreement for the purchase of a neighbouring dairy farm and associated Fonterra shares from a Mr and Mrs Borkin (the Borkins), for $7,298,928 plus GST. The agreement was conditional on Forivermor obtaining finance within seven working days. A deposit of $821,129.40, being 10 per cent of the purchase price plus GST, was payable when the agreement became unconditional. The settlement date was 29 May 2009.

[3] On 5 September 2008 ANZ approved finance for the purchase, being a "term loan" of $2,167,000 and a "GST bridging loan" of $874,000. The new lending was "on the basis" that Forivermor would obtain the balance of the purchase price from the sale of 57 ha of another farm Forivermor already owned for $4,300,000, associated Fonterra shares and a Morley family contribution of $1,000,000.

[4] After a telephone conversation on 8 September 2008 between Forivermor's lawyer, Mr Richard Blackwood, and Mr Mark McLauchlan, the ANZ's representative, about the ANZ's position in the event that the other farm did not sell as anticipated, the deposit was paid and the agreement declared unconditional.

[5] Shortly afterwards the market for dairy farms began to fall sharply on the back of a declining Fonterra milk payout projection and a collapsing Fonterra share price. The value of the Borkins' farm declined by 36 per cent and Forivermor was unable to sell any part of its farm.

[6] Ultimately Forivermor had to sell its whole farm for $3,300,000 plus GST and the ANZ declined to provide the additional funds required to settle the purchase of the Borkins' farm. The Borkins cancelled their agreement with Forivermor and instead sold to a third party for $4,500,000 plus GST, including shares, in March 2010.

[7] Forivermor issued proceedings in the High Court against the ANZ claiming breach of contract, damages for misrepresentation under the Contractual Remedies Act 1979, breach of contract based on two provisions in the Code of Banking Practice, negligence, breach of fiduciary duty, breaches of ss 9 and 13(h) of the Fair Trading Act 1986 and breach of the Consumer Guarantees Act 1993. Forivermor sought judgment for its actual liability to the Borkins, expenditure in preparation for the purchase of the Borkins' farm, the deposit on the Borkins' farm ($821,129.40), $4,498,363 representing the loss of the equity of the farm property it used to own, exemplary damages, interest and costs.

[8] In the High Court, Forivermor's claim failed on all grounds and judgment was entered in favour of the ANZ.[1]

[9] Forivermor appeals to this Court on the grounds that the High Court Judge, Goddard J, erred in respect of her assessment of the evidence and her application of the law relating to each of the nine causes of action. Notwithstanding the apparent scope of the appeal, Mr Thwaite for Forivermor acknowledged that the appeal turns

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1 *Forivermor v ANZ National Bank Ltd* [2012] NZHC 1763.

principally on the terms of the September 2008 finance contract between Forivermor and the ANZ.

[10] The ANZ supports the judgment under appeal.

Background

The terms of the finance contract

[11] The ANZ's offer of finance was contained in a letter dated 5 September 2008 from Mr McLauchlan to Mr and Mrs Morley, which read:

> 5th September 2008
>
> Forivermor Ltd,
> C/o the Directors,
> S J & J M Morley,
> 1268 Gordon Road,
> RD1
> Te Aroha
>
> Dear, Stuart & Joanne
>
> I am please [sic] to confirm that The National Bank [now ANZ] has approved finance to purchase a 81.0992Ha located 140 Shaftsbury Rd, Te Aroha.
>
> Finance has been based on the following proposal as discussed with you both:

Required For		Funded By	
Property Purchase & Shares	$7,299,000	National Bank, Term Loan	$2,167,000
MA Cows 150@ $2,000/Hd	$300,000	GST Bridging Loan	$874,000
Assorted Machinery	$100,000	Proceeds from 57 ha Sale	$4,300,000
Development, races	$20,000	Proceeds, Dairy Shares 45,000 Sale	$252,000
GST on Land & Stock	$874,000	Family Contribution	$1,000,000
TOTAL	$8,593,000	TOTAL	$8,593,000

> The new lending is on the basis:

- Customer Contribution from:
a) Sale of 57 ha of $4,300,000
b) Sale of 45,000 Fonterra Dairy Co shares, from 57 ha Dairy unit being sold.
c) Contribution from Family of $1,000,000.
- New 1st mortgage over the 81Ha Borkin block.

Yours sincerely

Mark McLauchlan
Rural Manager,
Matamata Branch

[12] Mr and Mrs Morley referred this offer to their lawyer, Mr Blackwood, for advice. As Goddard J found,[2] Mr Blackwood "clearly had some concern about the Bank's offer of finance requiring a sale of the 57 ha block for $4.3 m".

[13] Mr Blackwood therefore telephoned Mr McLauchlan on 8 September 2008 and made a file note of the discussion, which read:

> 8/9/08
>
> I rang Mark McLauchlan at NBNZ [ANZ] Matamata and asked if they would confirm their offer of finance even though the 57 ha property does not sell in time – or sell for enough. Will the Bank still cover them for finance to complete the deal? The best he can say is that this offer is based on a projected sale or even if it didn't happen they would probably still cover them at least for the short term. They have done budgets on a conservative basis. The bank won't walk away from them he says – but he can't/won't put it in writing.

[14] In his brief of evidence for the High Court, Mr Blackwood said:

> 13 The purpose of the conversation was to discuss the financial position in the case that the present property of 57 ha would not sell in time, or would not sell for enough. I wanted to know whether the Bank would still cover Forivermor Limited for the finance to complete the purchase of the farm from Mr. & Mrs. Borkin.
>
> 14 Mr. MacLauchlan told me:
>
> (a) the Bank's offer was based on a projected sale;
>
> (b) even if the sale didn't happen, the Bank would probably still cover the Morleys at least for the short-term;
>
> (c) the Bank had done budgets on a conservative basis;

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2 At [57].

(d) the Bank would not walk away from Mr. & Mrs. Morley.

He did say he can't/won't put that in writing.

15 Although it is not recorded in my file note, I recall the words being used, that the Bank would not 'leave the Morleys to be hung out to dry'.

[15] Under cross-examination, Mr Blackwood confirmed that he reported the content of his conversation with Mr McLauchlan to Mr and Mrs Morley. Mr Blackwood gave no evidence, however, as to any advice he gave to Mr and Mrs Morley about his concerns, and the risks Forivermor would run if it accepted the ANZ's offer on those terms and declared the agreement for the purchase of the Borkins' farm unconditional. In these circumstances an inference may be drawn that Mr Blackwood's evidence on this issue would not have assisted Forivermor.[3]

[16] Mr Morley confirmed under cross-examination that Mr Blackwood had reported on his conversation with Mr McLauchlan. Mr Morley's evidence was that Mr Blackwood had said:

> The bank hasn't given me much to go on and are you sure about the assurances that you've been given.

Mr Morley said that he had told Mr Blackwood that "We've been given multiple assurances." Mr Morley gave no evidence, however, as to any advice he received from Mr Blackwood about Mr Blackwood's concerns and the risks Forivermor would run if it accepted the ANZ's offer and declared the agreement for the purchase of the Borkins' farm unconditional. Once again an inference may be drawn that Mr Morley's evidence on this issue would not have assisted Forivermor.

[17] Mr McLauchlan also gave evidence about his conversation with Mr Blackwood. His evidence is summarised in the judgment under appeal:

> [59] Mr McLauchlan's evidence was that Mr Blackwood actually telephoned him on more than one occasion seeking an undertaking that the Bank would provide bridging finance if the Morleys were unable to sell the 57 ha for a sufficient price. These calls were before the agreement for sale and purchase was declared unconditional. Although Mr McLauchlan did not

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3 Compare *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320–321; *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA) at [153]–[154]; and *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, (2011) 243 CLR 361 at [63]–[64].

> make a file note of either the 8 September phone call with Mr Blackwood or of the other call in which Mr Blackwood raised the same query, he agrees with the tenor of Mr Blackwood's file note of the 8 September 2008 call. However, Mr McLauchlan doubted that he would have used the words "the Bank won't walk away from them". Rather, Mr McLauchlan's evidence was that he could clearly remember explaining to Mr Blackwood in both calls that the Bank could not commit to providing urgent finance. He conceded that he may well have said that the Bank would probably cover the Morleys in the unlikely event that they could not sell their farm. However, he said that the Bank could not give an undertaking to do so and explained why. He remembers discussing the variables involved in the budgets, which meant that there was no certainty as to what the position would be.

[60] Mr McLauchlan also said:

> > I distinctly recall that, in one of the conversations, Mr Blackwood raised that he was concerned about the Morleys being exposed because the agreement with the Borkins was not conditional on the sale of the 57 hectares. I recall him saying that he was worried about them being sued and about them losing their deposit. I distinctly recall this because the idea that the Morleys could be sued had not occurred to me before Mr Blackwood raised it. I distinctly recall telling him that he needed to tell the Morleys about those risks.
> >
> > I remember discussing both conversations with Dave Johnson, the credit manager. During one of the two calls, I asked Mr Blackwood to hold the line while I had a brief discussion with Mr Johnson about it. Mr Johnson agreed that we could not give a commitment.

The agreement for the farm purchase becomes unconditional

[18] On 9 September 2008 a sum of $808,129.25, being an advance from the term loan (which was a miscalculation of the deposit and was subsequently topped-up) was paid into Mr Blackwood's trust account by the Bank and on 10 September 2008 Mr Blackwood wrote to the lawyers acting for the Borkins advising:

> I am instructed by my clients that finance has been approved and that this contract is now unconditional.

[19] Mr Blackwood's letter written on behalf of his client Forivermor confirms that the ANZ's offer of finance had been accepted by Forivermor. We do not accept Mr Thwaite's submission that because there was no direct evidence of any response from Forivermor or Mr and Mrs Morley to the ANZ accepting the offer it was not accepted at the time. The actions taken by their lawyer acting on their behalf provide

more than sufficient evidence that the offer was accepted. There was no suggestion that Mr Blackwood had acted without his clients' authority.[4]

[20] Our conclusion that the offer was accepted is supported by the pleadings where Forivermor referred to the ANZ's offer constituting a finance contract and the ANZ admitted the offer "was accepted".

An ANZ assurance on 9 September 2008?

[21] There was a dispute in the evidence given at the trial about the nature of an assurance said to have been given by ANZ representatives to Mr and Mrs Morley on 9 September 2008, that there would be no need to sell the 57 ha as the ANZ would have sufficient security without that sale.

[22] Goddard J was satisfied, however, that no such assurance was or could have been given. Her reasons were:

> [65] It is understandable that Mrs Morley may have made such an inquiry during the 9 September visit, given Mr Blackwood had discussed that very issue with Mr McLauchlan only the day before and reported on it to Mr and Mrs Morley. However, Mr Cotton and Mr McLauchlan were emphatic in their evidence that they would not have given such advice and neither has any recollection of Mrs Morley asking such a question.
>
> [66] As the express terms of the Bank's loan offer of only four days earlier were based on the sale of the 57 ha for $4.3m, it would be extraordinary if either Mr Cotton or Mr McLauchlan would have given the advice contended for by Mrs Morley. I am satisfied that no such assurance was or could be given by either Bank officer and their evidence on this point is to be preferred.
>
> [67] However, I can accept that, given the buoyant state of the rural property market in the area at that time, the Bank officers may have appeared reassuringly confident that the property would sell for its estimated price within a reasonable time. But any such assurance would not abrogate the written terms of the loan offer, as Mr Blackwood was very aware. He may well have advised the Morleys to seek insertion of a clause making the contract conditional on the sale of the 57 ha block at a minimum price. Against this, the clear inference is that Mr and Mrs Borkin would not have accepted such a condition, given the bullish state of the rural property market at that time and everyone's confidence in it. Indeed, Mr Borkin said so, in both his evidence in chief and under cross-examination.

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[4] See GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2010) at [3.70]–[3.135].

[23] We are satisfied that Goddard J's assessment of the relevant disputed evidence on this issue was open to her, and that there is no basis on appeal for us to reach a different conclusion.

[24] This means that all of Forivermor's grounds of appeal need to be considered on the basis that the terms of the finance contract between Forivermor and the ANZ were contained in the ANZ's written offer of 5 September 2008, and that those terms were accepted by Forivermor without amendment.

Nine causes of action

Breach of contract?

[25] Forivermor contended that:

(a) the ANZ's offer contained "an absolute promise to finance the purchase of the Borkin farm";

(b) there was no explicit condition requiring the prior sale of the 57 ha; and

(c) assurances were given to Mr and Mrs Morley and Mr Blackwood that the Bank would not require the prior sale of the 57 ha before advancing funds or requiring a sale at $4,300,000.

[26] Goddard J's reasons for rejecting Forivermor's contentions are clear and persuasive. As we are unable to improve on her reasons,[5] we adopt them:

> [94] The essential question is whether the risk that materialised as events unfolded was assumed by the Bank or by Forivermor?
>
> [95] The start and end point is the offer of finance made in the letter of 5 September 2008 and accepted by Mr and Mrs Morley on behalf of Forivermor. The Bank agreed to provide the necessary funding to complete settlement of the Borkin property on the basis as set out in that letter. The offer contained in it was based on a viable proposal of cash contributions from the Morleys, sourced from the sale of the 57 ha block; the associated

[5] Compare *Brumby v Milner* (1975) 51 TC 583 (HL) at 612 per Lord Wilberforce and *Neumans LLP (A Firm) v Andronikou* [2013] EWCA Civ 916 at [36]–[40] per Mummery LJ.

> dairy company shares; and a cash contribution from the family. The debt to the Bank for the new borrowing would be secured by a first mortgage over the Borkin farm on settlement of its purchase. It is clear that at the time the loan offer was made and accepted by the Morleys, both parties were confident that the 57 ha block would sell within the settlement period and their confidence was justified at the time. Mr and Mrs Morley were taking advice from Mr Blackwood and from Forivermor's accountant. The Bank was doing its own homework for its internal lending security purposes. It was not for the Bank to require the Morleys to make their purchase of the Borkin farm conditional on the prior sale of the 57 ha block. The risk of proceeding with an unconditional purchase was Forivermors.
>
> [96] In the result the conditions on which the Bank had agreed to advance the money and which had been accepted by Forivermor could not be met and the Bank was not obliged to provide finance on a different and unapproved basis. The borrowing that would now be required to complete settlement in May 2009 was unsustainable and the security for the Bank loan was no longer adequate. In reality, had the Bank advanced the loan it would have been calling up the loan when inevitably Forivermor was unable to service it.
>
> [97] The express terms of the loan offer and the absence of any ambiguity or obvious lacuna preclude importation of an oral term. In any event, the evidence does not support the plaintiff's contention that a variation was agreed to by Mr McLauchlan or his superiors at the Bank. What the evidence does point to is the fact that the Bank made an effort to assist the Morleys with advice as to how the debt they were seeking to incur might be sustained, despite the steadily deteriorating situation.
>
> [98] Mr Blackwood rightly had misgivings about the potential for risk and conveyed those to his clients and to the Bank. But the Bank gave no commitment to Mr Blackwood or to the Morleys, at any stage, to the effect that the Bank would provide finance in the event that the 57 ha did not sell in time or sell for enough.

[27] In essence all of Forivermor's contentions are answered by the clear and unambiguous terms of the finance contract. The ANZ's obligation was dependent on Forivermor providing its stipulated contributions. ANZ would advance the deposit out of the term loan before the sale of the 57 ha. If the 57 ha could not be sold for $4,300,000 before settlement of the purchase of the Borkin farm on 29 May 2009, the ANZ was not obliged to advance further funds and would be entitled to be repaid the deposit plus interest. By advancing the deposit as contemplated, the ANZ was not waiving Forivermor's contribution obligations, which had to be met in time for settlement of the purchase of the Borkin farm.

[28] Furthermore, if, contrary to our conclusion, the ANZ had been obliged to advance the balance of $2,167,000 plus the GST bridging loan of $874,000, there is no evidence that Forivermor would have been able to provide the balance of the

funds required to complete the purchase. Forivermor would therefore have suffered the same loss in any event under this cause of action.

[29] With the failure of the appeal against the High Court's decision on the breach of contract cause of action, the remaining causes of action may be dealt with relatively briefly.

Damages for misrepresentation under the Contractual Remedies Act 1979?

[30] In the High Court Forivermor contended that it entered into the finance contract and declared the purchase of the Borkins' farm unconditional in reliance on representations by the ANZ that:

(a) it would not "leave the Morleys to be hung out to dry";

(b) "the Bank won't walk away from them"; and

(c) there was no need for the Morleys to sell the 57 ha as the Bank would have sufficient security without such a sale (the alleged assurance of 9 September 2008).

[31] Goddard J rejected Forivermor's contentions.[6] We agree with her reasons for doing so:

(a) The suggested oral variations of the written loan offer were never imported into it and never approved by appropriate authorities within the Bank.

(b) The alleged assurance of 9 September 2008 was not given.

(c) The Bank's subsequent conduct was entirely consistent with Mr McLauchlan's statement that the Bank would "probably" advance necessary funds, because it continued to explore funding options until March 2009.

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6 *Forivermor v ANZ National Bank Ltd*, above n 1, at [100]–[101].

(d) As the Morleys and Mr Blackwood knew from the time of the 8 September 2008 telephone call, the Bank had not committed to providing bridging finance.

(e) Forivermor took a calculated risk in proceeding to declare the agreement unconditional on 10 September 2008.

[32] On appeal Forivermor relies, in support of its contention, on further representations allegedly made by the ANZ, namely:

(a) by describing itself three years earlier as a "partner" in Forivermor's business;

(b) by describing in a letter dated 25 August 2008 the scenario of keeping both farms as "worst case";

(c) by agreeing on 2 September 2008 to discuss "loan structure market conditions"; and

(d) by providing the funds to pay the deposit.

[33] We agree with Mr Walker's submissions for the ANZ that none of these further representations alters the High Court Judge's conclusion:

(a) A bank describing itself as a "partner" in its customer's business does not imply that the bank will fund the customer's transactions no matter what.

(b) The description of the option of keeping both farms as "worst case" was in the sense of an untenable, not an acceptable, proposition.

(c) An agreement to discuss "loan structure market conditions" cannot be construed as a representation the ANZ would fund up to the whole purchase price.

(d) Providing the funds for the deposit, against an offer of finance on the basis of the stipulated customer contribution, cannot be construed as a representation that the ANZ would fund the purchase even without the customer contribution.

[34] As Mr Walker pointed out, the alleged representations would be directly inconsistent with the offer of finance in the ANZ letter of 5 September 2008 and with the conversation between Mr Blackwood and Mr McLauchlan on 8 September 2008. Mr McLauchlan's statement that the ANZ "would probably still cover the Morleys at least for the short-term" did not misrepresent his position. The contrary suggestion was not put to him in cross-examination as required by s 92 of the Evidence Act 2006. Mr McLauchlan's and the ANZ's subsequent conduct demonstrated a good faith intention to help Forivermor and Mr and Mrs Morley, even as the financial position deteriorated. Mr Morley acknowledged in cross-examination that the ANZ had not walked away from them. The ANZ had intended to advance the balance of the term loan and the GST bridging loan, provided Forivermor produced its stipulated contributions.

[35] The appeal based on the second cause of action is therefore also unsuccessful.

Breach of clause 1.2(b)(iv) of the Code of Banking Practice 2007?

[36] Clause 1.2(b)(iv) of the Code of Banking Practice provides:

> (b) In order to achieve [the Code's] objectives [your bank] will:–
>
> …
>
> (iv) act fairly and reasonably towards you, in a consistent and ethical way. What may be fair and reasonable in any case will depend on the circumstances, including our conduct and yours.

[37] Forivermor contended that the ANZ was in breach of this provision, which was incorporated into the finance contract:

(a) expressly, by a reference to ANZ's website in the standard form header used in the 5 September 2008 letter, on the basis that the Code

appears on the website; or

(b) implicitly, by custom.

[38] In the High Court Goddard J rejected Forivermor's contention on the ground that the ANZ had not acted other than fairly and reasonably towards Forivermor.[7]

[39] On appeal Forivermor has repeated its contention. We accept, however, the submissions for the ANZ that not only did the ANZ not breach cl 2.1(b)(iv) but also that the clause was not in any event incorporated into the finance contract.

[40] The factual findings made by Goddard J in the High Court relating to the ANZ's conduct towards Forivermor, which we have already found were open to the Judge on the evidence in this case, mean that the ANZ complied with any obligation to act fairly and reasonably towards Forivermor. The ANZ went out of its way to do what it could for Forivermor. The ANZ knew that Mr Blackwood was acting for Forivermor and Mr and Mrs Morley, and was entitled to expect Mr Blackwood to warn his clients of the risks and to give them appropriate independent advice.

[41] The reference to the ANZ's website on its letterhead did not import into the finance contract the whole content of the website. To the extent that that information on the website consists of statements capable of being operative terms in a contract, the bare reference to the website did not constitute adequate notice of the incorporation of the information into the parties' agreement. The lack of any specific reference in writing and the lack of proximity of the making of the statements to the parties' agreement indicate that it is more likely that the Code was not intended to have contractual force.[8]

[42] The circumstances in which a court may imply a term in a commercial context are governed by the question of what a reasonable person would consider both parties must have meant to happen in circumstances not expressly addressed by

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7 *Forivermor v ANZ National Bank Ltd*, above n 1, at [104]–[105].

8 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at [6.2.3].

the contract.[9] The importation of terms by usage or custom rests on the assumption that it represents the intention of the parties, unless they expressly depart from it.[10] A term will be implied by custom if the alleged custom:[11]

(a) has acquired such notoriety that the parties must be taken to have known of it and intended that it form part of the contract;

(b) is certain and reasonable;

(c) is proved by clear and convincing evidence; and

(d) is not inconsistent with any other terms of the contract.

[43] As Mr Walker submitted, Forivermor adduced no evidence of the alleged custom. The Code of Banking Practice is a self-regulatory standard developed by members of the New Zealand Banking Association and enforced by reference to the Banking Ombudsman. It is not designed as a contractual code enforceable by private action.[12] The fact that an obligation is in the Code is not evidence that it is a customary obligation in banking contracts.

[44] It is not sufficient for Forivermor to say that the Code itself is well-known. What must be notorious is the fact that the relevant term is customary in contracts of this kind. We agree with the reasons of Associate Judge Doogue in *Westpac NZ Ltd v Patel* where he rejected, in the context of a summary judgment, an identical submission by Mr Thwaite, made in mistaken reliance on Goddard J's decision in this case, that there was any evidence that the terms of the Code are customarily imported into contracts between customers and banks.[13]

[45] The test of "business efficacy" and "obviousness" for implication, set out in

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9 *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 at [42].

10 Burrows, Finn and Todd, above n 8, at [6.3.1].

11 *Woods v N J Ellingham & Co Ltd* [1977] 1 NZLR 218 (SC) at 220 and *Everist v McEvedy* [1996] 3 NZLR 348 (HC) at 360.

12 Compare *Barraclough v Brown* [1897] AC 615 (HL) at 619–620; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 (HL) at 302; and *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 at [103]–[105].

13 *Westpac NZ Ltd v Patel* [2013] NZHC 1011 at [19]–[21] and [30].

BP Refinery (Westernport) Pty Ltd v Shire of Hastings,[14] may be no more than "a useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean".[15] To the extent this remains an independent test, cl 1.2(b)(iv) of the Code of Banking Practice does not meet this test here where the express terms of the finance contract are clear.[16]

[46] The appeal based on the third cause of action is therefore unsuccessful.

Breach of clause 5.1 of the Code of Banking Practice?

[47] Clause 5.1 of the Code of Banking Practice provides, in part:

> (a) When you seek Credit from us, we will provide you with information about the various types of Credit Facilities available to you, so that you can make an informed decision.
>
> (b) When considering your application for Credit we may take into account your financial history, including information from Credit Reference Agencies. We will obtain your consent before accessing information about you from third parties.
>
> (c) We will only provide Credit to you or increase your Credit limit when the information available to us leads us to believe you will be able to meet the terms of the Credit Facility. We have the right to decide not to provide Credit to you.
>
> (d) When a Credit Facility is approved by us, we will comply with all laws that may apply. We will inform you, and any party providing Security, of your obligations including:
>
> (i) the annual interest rate and whether it may be changed during the period of the Credit Facility;
>
> (ii) all fees and charges (including government charges and taxes);
>
> (iii) the period for which the Credit Facility is available;

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14 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

15 *Hickman v Turn and Wave Ltd* [2011] NZCA 100 at [248]. See *Gibbston Downs Wines Ltd v Perpetual Trust Ltd*, above n 9, at [41]–[45], discussing the recent review of the implication of terms into contracts by the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [16]–[27]; and *Nielsen v Dysart Timbers Ltd* [2009] NZSC 43, [2009] 3 NZLR 160.

16 See *Westpac NZ Ltd v Patel*, above n 13, at [26].

(iv) the repayment terms, including any terms relating to early repayment

...

[48] In the High Court Goddard J held that there was no basis for this cause of action:

> [107] At the time the loan was sought, in August 2008, the Bank's internal lending security checks established to the Bank's satisfaction that Forivermor should be able to meet its credit obligations on the basis as proposed. Whilst it may be impossible to eliminate every element of risk in a financial transaction, the risk at that time appeared minimal or nonexistent. Nobody foresaw that the market would collapse as it did and that the whole financial situation would consequentially unravel. I accept that it was the market collapse which undid the transaction in this case. The Bank would have been in breach of the Code of Banking Practice, had it provided further credit in March 2009, at a time when the Bank's calculations showed that Forivermor's resulting equity would now only be 7.3 per cent and that this would soon be consumed by operating deficits.

[49] We agree with Goddard J. Like the appeal based on cl 1.2(b)(iv) in the third cause of action, the appeal based on cl 5.1 in the fourth cause of action fails for the same reasons: cl 5.1 was not incorporated into the finance contract and there was in any event no breach of the clause.

[50] On the contrary, like Mr and Mrs Morley and their lawyer, the ANZ believed that Forivermor would be able to meet the terms of the finance contract. The collapse of the Fonterra share price and the value of the Borkins' farm was quite unexpected.

[51] Furthermore, as Goddard J noted, the ANZ would have been in breach of the Code if it had in fact provided Forivermor with further credit in March 2009, when the ANZ's calculations showed that Forivermor's resulting equity would be 7.3 per cent and would soon be consumed by operating deficits.

Negligence?

[52] In the High Court Goddard J rejected Forivermor's fifth cause of action based on negligence.[17] After summarising the relevant pleadings, the Judge found on the basis of the facts of the case that no aspect of this cause of action had been established.

[53] On appeal Forivermor now claims that the ANZ owed it two duties of care:

(a) a duty not to advance any part of the deposit until it had confirmed that it would only lend on the basis of the finance offer of 5 September 2008; and

(b) a duty to act fairly and consistently towards Forivermor, in a consistent and ethical way.

[54] Forivermor claims that the ANZ breached these duties by lending the funds for the deposit and misleading Forivermor as to the finance which the ANZ would provide.

[55] We agree with the submissions for the ANZ that not only did the ANZ not owe these duties, but also that there was no breach by the ANZ of any such duties.

[56] It is well-established that, as a general principle, a bank does not ordinarily owe its customers any general duty to furnish careful advice on business or banking transactions, whether in contract or tort, unless it specifically undertakes to do so.[18] There is no authority to support Mr Thwaite's submission that the closeness of the relationship between a bank and its customer gives rise to a general duty of care.[19] The focus should be on the question of whether a bank can be taken to have "crossed

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17 *Forivermor v ANZ National Bank Ltd,* above n 1, at [108]–[110].

18 *Banbury v Bank of Montreal* [1918] AC 625 (HL) at 654; *Westpac Banking Corporation v McCreanor* [1990] 1 NZLR 580 (HC) at 583–584; *Wilkins v Bank of New Zealand* [1998] DCR 520; *Laws of New Zealand* Banking at [38]–[40]; and EP Ellinger, Eva Lomnicka and CVM Hare *Ellinger's Modern Banking Law* (5th ed, Oxford University Press, Oxford, 2011) at 158–159, 162 and 736–737.

19 See *Bank of New Zealand v Geddes* HC Auckland CIV- 2008-404-8082, 28 May 2008 at [22]–[23].

the line" and impliedly assumed the duties of an adviser in addition to those of a mere banker.[20]

[57] As Mr Walker submits, the first duty alleged by Forivermor makes no sense in the circumstances. It was understood by Forivermor and the ANZ that the ANZ would supply the funds for the deposit some eight months before settlement of the purchase of the Borkins' farm on 29 May 2009. Both parties would have understood that this portion of the loan was to come from the term loan of $2,167,000 referred to in the letter of 5 September 2008. By advancing the deposit, ANZ was acting consistently with the letter. It was not departing from its terms. No breach of any duty was involved.

[58] The second duty relied on by Forivermor is not a duty of care. The fact that banks have voluntarily assumed such a duty in the Code of Conduct does not convert it into a general duty of care imposed by the law.[21].

[59] In any event the ANZ did act fairly, ethically and consistently. This cause of action therefore fails too.

Breach of fiduciary duty?

[60] In the High Court Goddard J held that the ANZ did not owe any relevant fiduciary duties to Forivermor.[22] After referring to the essential basis of the claim, namely the concept of a "partnership" between Forivermor and the ANZ, the Judge pointed out that any "partnership" arising from the banking relationship did not override the fact that Forivermor had its own financial and legal advisers, and the fact that it was Mr and Mrs Morley who made the decision to proceed with the unconditional contract for the purchase of the Borkins' farm, not the ANZ.

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20 Ellinger, Lomnicka and Hare, above n 18, at 736.

21 *Clarke v Westpac Banking Corporation* (1997) 6 NZBLC 102,182 (HC) at 102,192: "… the Code does not impose a duty of care which alters the equitable principles referred to above. They may be sound rules of business practice but they do not in my view, impose a legal obligation under which [a plaintiff] can bring a ... claim for a breach of duty of care"; and *The Hong Kong and Shangai Banking Corporation Limited v Howe* [2012] NZHC 2066 at [52]–[54].

22 *Forivermor v ANZ National Bank Ltd,* above n 1, at [111]–[114].

[61] The Judge then said:[23]

> [113] The description of the Bank as a 'partner' in the business at a meeting on 1 November 2005 between the Morleys and their (then) relationship manager did not create a relationship that transcended the usual banker-customer relationship so as to become fiduciary in nature. Case law has established that "… the relationship of banker and customer is not one where there will be any presumption of a fiduciary relationship". In *Shotter v Westpac Banking Corporation* a friendly working relationship between the plaintiff and his local branch manager during which there were frequent discussions on the progress of Mr Shotter's business ventures were alleged to show "a relationship of trust and confidence giving rise to a fiduciary relationship, leading in turn to a presumption of undue influence".
>
> [114] Referring to the test applied by Lord Scarman in *National Westminster Bank Plc v Morgan* "that the determination of whether such a relationship as is alleged here exists is to be arrived by "a meticulous examination of the facts"", Wylie J found on the facts that no fiduciary relationship existed in Mr Shotter's case.
>
> > 3. A fiduciary relationship does not automatically arise from the relationship of banker and customer. Each case requires a meticulous examination of the facts. In this case there was nothing to indicate that the bank had crossed the line between a normal business relationship of banker and customer and a relationship of dominating influence.

[62] We agree with the Judge's analysis of this cause of action. As Mr Thwaite has not persuaded us that there is any ground for reaching a different conclusion, it too fails.

Breach of s 9 of the Fair Trading Act 1986?

[63] Section 9 of the Fair Trading Act provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[64] In the High Court Forivermor claimed that the ANZ had engaged in misleading and deceptive conduct in advising Forivermor that if the 57 ha did not sell for $4,300,000, the ANZ would still advance sufficient funds to enable Forivermor to acquire the Borkins' farm.

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[23] Footnotes omitted.

[65] Goddard J rejected this claim on the ground that it was not established on the facts for the reasons already given.[24]

[66] We agree with her that this conclusion was inevitable and that this cause of action fails.

Breach of s 13(h) of the Fair Trading Act?

[67] Section 13(h) of the Fair Trading Act provides that no-one should:

> make a false or misleading representation concerning the need for any goods or services …

[68] In the High Court Goddard J said:

> [118] Essentially the plaintiff says that the Bank set up the transaction with Forivermor on the basis that the 57 ha block was worth $4.3m and the proceeds could be used to finance the purchase of the Borkin farm. Mr Thwaite submitted that, in fact, the maximum that could be expected would have been $4,050,000. He said Forivermor should not have been encouraged or allowed to enter into the agreement for sale and purchase of the Borkin farm, or to declare it unconditional, because Forivermor was most unlikely to be able to complete. Once again the argument advanced under this head is untenable on the facts, for the various reasons already given in this judgment.

[69] We agree. This cause of action fails.

Breach of the Consumer Guarantees Act 1993?

[70] In the High Court Goddard J said:

> [119] This cause of action is based on the fact that the Borkin farm had a house on it which would be occupied by Mr and Mrs Morley and their family. Mr Thwaite argued that the Consumer Guarantees Act 1993 applied to the situation because Forivermor was a "consumer" in terms of the Act, as it was intending to acquire a residential house on the Borkin farm.
>
> [120] Apart from the obvious point that the primary purpose of the proposed lending was rural farm lending, as opposed to ordinary personal or domestic use or consumption, the lending was fit for purpose.

[71] We agree. This cause of action fails.

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[24] *Forivermor v ANZ National Bank Ltd*, above n 1, at [116].

No loss

[72] Finally, we agree with Mr Walker that Forivermor suffered no loss of equity in its own assets as a result of the acts or omissions of the ANZ. Forivermor would have suffered the loss in its equity in any event as a result of the collapse in the market for dairy farms. Even if the ANZ had advanced additional funds to Forivermor to enable it to complete the purchase of the Borkins' farm, Forivermor would have been in the same position. It would have paid some $7,298,000 for a property which, by March 2010, was worth $4,500,000, incurring a loss of some $2,798,000. There is no evidence it would have been able to sell its farm at a better price than it did. It would also have been in debt to the ANZ for additional funds and interest.

[73] The outcome is the same whether an expectation or reliance measure of damages is used.

[74] We also record Mr Thwaite's advice that the Borkins have taken no steps to pursue a claim against Forivermor for damages for loss on the resale of their farm while this litigation remained outstanding. The Borkins apparently acknowledged that Forivermor is insolvent and would have no financial means to satisfy a judgment unless this appeal succeeds and funds are able to be recovered from the ANZ.

Result

[75] For these reasons the appeal is dismissed.

[76] We also grant the application by the ANZ for increased costs. The appellant is to pay the respondent costs on a band A basis with a 50 per cent uplift plus usual disbursements.

[77] We agree that Forivermor has pursued an appeal that had no reasonable prospects of success. The factual findings of Goddard J in the High Court, especially the findings based on her assessment of the witnesses who gave evidence, meant that this outcome was inevitable. We do not agree with Mr Thwaite that the issues relating to the alleged application of the provisions of the Code of Banking Practice

justified the appeal, when the Code was clearly not part of the finance contract or relevant on the facts to the claim by Forivermor against the ANZ.

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