**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 43/2018**
**[2018] NZSC 73**

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| BETWEEN | JOHN STEPHEN PATRICK<br>Applicant |
| AND | BANK OF NEW ZEALAND<br>Respondent |

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| Court: | Elias CJ, Glazebrook and O'Regan JJ |
| Counsel: | A J Woodhouse for Applicant<br>R J Gordon for Respondent |
| Judgment: | 8 August 2018 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicant is to pay costs of $2,500 to the respondent.**

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**REASONS**

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal.[1] In that judgment, the Court of Appeal upheld a decision of the High Court granting summary judgment to the respondent for the liability of the applicant under a guarantee granted by the applicant to the respondent in respect of the obligations of certain companies with which he was associated (the Moteo Group).[2]

[2] The applicant changed lawyers after the High Court decision was delivered, and on appeal sought to adduce further evidence and to expand the grounds on which

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1 *Patrick v Bank of New Zealand* [2018] NZCA 122 (Gilbert, Dobson and Toogood JJ) [CA judgment].

2 *Bank of New Zealand v Patrick* [2017] NZHC 1184 (Associate Judge Smith).

he opposed summary judgment. The proposed new evidence included extensive affidavits and exhibits from the applicant and a business adviser who had assisted the applicant, both of whom had filed affidavits in the High Court. In addition there was an affidavit from a lawyer who had previously acted for the Moteo Group.

[3] After an extensive consideration of the proposed grounds of opposition to summary judgment that were said to be supported by the new evidence, the Court of Appeal found that none was tenable, and that the evidence therefore lacked cogency and refused to admit it.[3] Although not determinative of the admissibility decision, the Court also rejected an argument made on behalf of the applicant that the new evidence should be admitted despite not being fresh (in the sense that the bulk of it was given by witnesses who had given evidence in the High Court) because the failure to adduce it in the High Court was based on trial counsel error. The Court did not accept that this was a basis to avoid the requirement that new evidence be fresh.[4] In any event, the Court found that trial counsel had not been incompetent because the arguments which the applicant's appeal counsel suggested should have been, but were not, run in the High Court were, in fact, untenable.[5]

[4] The applicant seeks to raise six points of appeal.

[5] The first two concern the Court of Appeal's refusal to admit the evidence that the applicant wished to adduce in that Court. The applicant wishes to argue that the Court should have treated the evidence as fresh because the failure to adduce it in the High Court was based on trial counsel error and also that the Court ought to have taken a less stringent approach given the summary judgment context. We accept that there may be a point relating to the test for the admission of fresh evidence that would warrant consideration by this Court, but in the present case the rejection of the fresh evidence was based on essentially factual considerations, leading to the Court of Appeal concluding that the evidence was not cogent and that the failure to admit it in the High Court did not, in fact, result from trial counsel incompetence. In those

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3 CA judgment, above n 1, at [48].
4 At [51].
5 At [53].

circumstances we do not see any proper basis for granting leave in relation to these points.

[6] The third ground is an argument that the Code of Banking Practice issued by the New Zealand Bankers' Association is enforceable in private actions and therefore could provide a basis for resistance of summary judgment if there was a tenable case that the Code had been breached. The applicant argues that the High Court and Court of Appeal decisions, dating back to 1996, that the Code is not enforceable by private action is an example of jurisprudential "creep" but, as the Court of Appeal noted, the applicant did not commit to whether any legally enforceable duty under the Code arose in tort, in contract or as an incident of a fiduciary relationship between bank and customer.[6] This argument was not raised in the High Court and rejected in the Court of Appeal in circumstances where no legal basis for it was identified. No such basis is identified in the leave submissions. In those circumstances, we cannot properly assess its chances of success. If we gave leave and the argument was particularised, we would be essentially addressing it as a first and last court. In those circumstances, we do not consider it is in the interests of justice to grant leave on this point.

[7] The fourth ground is that there may be lender liability on the part of the respondent in relation to the respondent's conduct in making the loans to the Moteo Group. The applicant argues that New Zealand law is out of step with other countries in this regard. As the respondent points out, there is no dispute that a bank may be liable for negligently given advice, if it assumes the duty of an adviser.[7] The Court of Appeal also accepted this, and noted that the argument for a wider duty making a bank liable for loss caused by making advances on terms that subsequently appear to be disadvantageous were again not identified as being an implied contractual term, a duty in tort or a fiduciary duty.[8] We do not see any point in embarking on an exercise of determining the existence or otherwise of a duty without some indication of the basis for it and a factual underpinning of a claim for breach of the duty.

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6 At [34].
7 *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [56].
8 CA judgment, above n 1, at [38].

[8] The fifth ground is that the respondent breached s 25 of the Personal Property Securities Act 1999, which requires that a secured party must exercise its powers "in good faith and in accordance with reasonable standards of commercial practice". The Court of Appeal considered this argument untenable on the evidence before it (even assuming admission of the proposed new evidence).[9] We see this as essentially a factual question which has been resolved against the applicant in both the High Court and the Court of Appeal.

[9] The sixth ground involves an argument relating to s 120 of the Credit Contracts and Consumer Finance Act 2003. The Court of Appeal found that this argument could not be pursued because it was commenced outside the limitation period set out in s 125(3) of that Act. It found the applicant's argument to the contrary was untenable.[10] We do not see sufficient prospect of an argument to the contrary succeeding to justify the grant of leave on this point.

[10] We do not consider the criteria for the grant of leave are made out. We therefore decline leave to appeal.

[11] We award costs of $2,500 to the respondent.

Solicitors:
Woodhouse Law, Auckland for Applicant
MinterEllisonRuddWatts, Wellington for Respondent

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9 At [44].
10 At [29]–[30].