



[3] The Bank says Mr Hussain did not properly check valuation reports and other information on which it had relied to advance money for the purchase of properties by some customers who it later identified as part of an organised fraudulent scheme. It says Mr Hussain's actions suggested he either knew about the fraud or was not exercising the care and skill required of him under the terms of his employment agreement in checking the reports and other information provided by those customers.

[4] In a statement in reply Mr Hussain denied the allegations but did not attend the Authority's notified investigation meeting or provide any direct evidence for its investigation. He is understood to be now resident in Queensland.

[5] Mr Hussain's reply included a counterclaim alleging the circumstances of leaving his employment with the Bank amounted to an unjustified dismissal.

### **The investigation**

[6] Dylan Marriott, an advocate, represented Mr Hussain through the Bank's initial inquiry. He also lodged Mr Hussain's statement of reply and participated in an Authority telephone conference in December 2008 at which an investigation meeting was scheduled for May 2009. That May investigation meeting was later postponed to give Mr Hussain more time to study documents provided by the Bank. An investigation meeting date for 23 and 24 July 2009 was agreed with the parties. On 11 June the Authority received news that Mr Marriott had sadly and unexpectedly died. In early July Mr Hussain was given an opportunity to seek a further postponement of the investigation but did not do so. The Authority is aware Mr Hussain was in contact with at least one specialist employment lawyer in Auckland during that period. Mr Hussain subsequently advised he had not appointed a new representative.

[7] Mr Hussain had undertaken in April 2009 to return to New Zealand to attend the Authority's investigation meeting. He did not do so although I am satisfied that he had adequate notice of the meeting. No good cause was shown for his absence and the Authority has proceeded to investigate and determine aspects of this matter in exercise of its powers under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[8] Following the investigation meeting, Mr Hussain was also given an opportunity to respond to the Bank's written closing submissions. On 19 August Mr Hussain sent the Authority support office an email applying for "*an adjournment*". A Minute from the Authority advised that it was "*too late*" for such an application but provided Mr Hussain with a further opportunity to reply to the Bank's written submissions. He did not do so.

[9] At the investigation meeting the Authority heard sworn oral evidence from ANZ sales manager Talauta Mimilo, who had been Mr Hussain's direct manager at the Bank, and ANZ mortgage fraud investigator Trudie Smith. They each also confirmed as true the contents of their written witness statements. Those statements had been provided to Mr Hussain prior to the investigation meeting, along with an extensive range of relevant background documents. Those documents included the Bank's records on some 18 mortgage applications alleged to illustrate careless or possibly fraudulent activity by Mr Hussain in carrying out his work. At the meeting the Bank produced the originals of some property valuation reports that Mr Hussain had accepted or used in processing applications for a number of mortgage loans and which the Bank has since identified as being fraudulent. Ms Smith also provided additional written information updating the Bank's assessment of the losses resulting from those loan transactions.

### **The issues**

[10] The issues arising for investigation are:

- a. Whether Mr Hussain breached the terms of his employment agreement by actions and omissions that were either negligent or fraudulent in making mortgage arrangements for certain customers;  
and
- b. If so, whether the Bank suffered losses as a result of those actions;  
and
- c. If so, whether Mr Hussain should be ordered to pay:
  - i. damages for those losses to the Bank, and
  - ii. penalties for breaches of his employment agreement.

[11] Mr Hussain's counterclaim also raised the issue of whether he was unjustifiably dismissed or, as the Bank considers, attempted to resign in order to avoid participating in its inquiry into his conduct. Given Mr Hussain did not attend or otherwise participate in the Authority's investigation, there was no evidence from him to support his allegation. Mr Hussain had given Mr Mimilo a letter on 7 September 2007 stating that he wished to tender his resignation. He also left a telephone message for Mr Mimilo on 12 September to the same effect. As a matter of fact Mr Hussain did resign from his job. I make no finding as to whether, in those circumstances, how his employment came to an end amounted to an unjustified dismissal.

### **The Bank's inquiry**

[12] During a routine audit of customer files Ms Smith identified concerns with some loans processed by Mr Hussain. In two files she noticed that the dates on valuation documents and the evidence of the customer's employment were later than the date of settlement for the sale and purchase of the property on which the Bank had advanced a loan. She then checked other files involving various customers of Mr Hussain. Her report on her inquiries – completed in August 2007 – identified substantial concerns about the information and documentation provided for seven customers.

[13] Ms Smith identified transactions between those customers and the Bank which appeared to her to involve what has been described as "*property price hydraulic fraud*".<sup>1</sup> This was a form of fraud to which banks were subject in recent years during a period of rising property prices and where they had been willing to lend as much as 100 per cent of a property's value to customers meeting certain criteria. I need not set out much detail of how such 'hydraulic' schemes work. The important element is that the perpetrators, having arranged to purchase a property from a genuine vendor, would also arrange a subsequent transfer between themselves at the same time or very shortly after. That transfer would involve a price based on a valuation report that was either fraudulently prepared or otherwise altered in order to show an inflated value for the property. That report was then used to support an application to a bank for a loan to purchase the property. The scheme would come to light only when the borrower

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<sup>1</sup> *R v Findlay* [2007] NZCA 553 at [6]

failed to make mortgage payments and the bank took possession of the property. The bank could then only sell that property for its actual market value rather than the fraudulently inflated value at which it had lent the money. Meanwhile the perpetrators had disappeared with the money that was the difference between the genuine valuation and the fraudulently inflated value of the property.

[14] Ms Smith's inquiries revealed transactions which appeared to be of that type and for which Mr Hussain had processed the loan applications. Her review of his files initially identified some 11 transactions in May, June and July 2007 where there were significant inadequacies in the quality of the information and documentation. These included:

- a. Valuation reports where the contact details for the supposed registered valuer had been changed – giving, for example, different phone numbers and postal addresses than the actual details for the valuer; and
- b. Property valuations different on the front of the report from that given in the body of the report or altered in a way that was obvious on inspection of the document; and
- c. Documents identifying the customer's employer, contact details for that employer, and salary information for the customer not on the file, or altered or not verified.
- d. Some files were missing entirely.

### **Mr Hussain's duties and terms of employment**

[15] Mr Hussain's role as a mobile mortgage manager included responsibilities for assessing each customer's financial situation based on the information provided by the customer. He had authority to approve credit to a certain level but applications seeking loans above that level of credit approval discretion (CAD) had to be "*uplined*", that is forwarded to a credit manager for approval. That manager then assessed the application on the premise that Mr Hussain had checked and provided accurate information. It would be assumed that he had properly reviewed property valuations and customers' statements of earnings.

[16] His employment agreement included an expectation of "*maintaining a high*

*standard of professional and personal integrity*". A specific term of that agreement required him to ensure he worked within policies established by the Bank for the conduct of its business.

[17] The Bank's credit risk policy included requirements to check the financial position of applicants, confirm applicants' income details with signed letters from their employers, and ensure the file contained certain documents, including valid valuation reports. The Bank's procedures included requirements for mobile mortgage managers to use various 'checklists' confirming certain types of information had been provided by the customer and that information was satisfactory. There was a checklist for the contents of registered valuers' reports on properties for which loans are sought and a checklist on the validation of customer information. It was the confirmations made by the mobile mortgage manager in those checklists that were then relied on by managers at the next step of the credit approval process.

[18] The Bank also used an internal electronic communication system to record queries and responses between staff about loan applications and progress with them. A credit manager would rely on information and answers provided by a mobile mortgage manager on that system.

[19] I accept Mr Mimilo's evidence that the Bank placed a high level of trust and confidence in Mr Hussain carrying out his work as mobile mortgage manager in a thorough and accurate manner. This was reflected in the requirements for commission payments under his salary package. Such payments, made after reaching identified performance targets for a level of mortgage business, could be withheld where his work was not "*well managed*". That term referred to compliance with the Bank's current credit policy, including its requirements for keeping documentation and taking reasonable steps to check the accuracy of such documentation, as set out in the checklists.

[20] In all aspects of his work Mr Hussain was subject to an implied term requiring him to exercise proper care and skill in the performance of his duties.<sup>2</sup> A serious breach of that duty to exercise diligence in the employer's interests will be

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<sup>2</sup> *Lister v Romford Ice* [1957] AC 555, 572 (HL, per Viscount Simmonds) followed in *F v Attorney-General* [1994] 2 ERNZ 62,60 (EC, Goddard CJ).

misconduct if it interferes with and prejudices the safe and proper conduct of the employer's business.<sup>3</sup>

[21] While the nature and standard or level of the duty may vary with the nature of the business and the position held by the employee, it has been held to apply to a bank officer with managerial responsibilities involved in processing and approving a loan: *Janata Bank v Ahmed* [1981] ICR 791 (English CA). Mr Ahmed, an assistant general manager, was found to have breached that duty by allowing a customer to withdraw 5000 pounds from an account established with a deposit of only 200 pounds. Mr Ahmed had neglected to make proper inquiries about the creditworthiness of the customer, who was not heard of again after getting the money.

### **Did Mr Hussain breach his terms of employment?**

[22] The Bank provided extensive documentation of the transactions involved in 18 particular loan applications processed by Mr Hussain. It submits that documentation reveals clear and repeated failure by him to properly carry out his duties and to comply with the Bank's policies and procedures for ensuring all necessary documentation was provided and properly checked before the application was "*uplined*" for approval by a credit manager.

[23] I need not set out all the details of each transaction or the documentation provided. During the Authority's investigation Ms Smith and Mr Mimilo spent the best part of a morning and an afternoon answering detailed questions from the Authority member on what the documents were said to show about Mr Hussain's work and whether he had satisfactorily carried out the requirements of the Bank's policies and procedures for that work. For a number of these applications Mr Hussain had advised the relevant credit manager that the required checklists were "*completed, acceptable*" or particular reports were not necessary. In each case he recommended "*unconditional approval*". From his knowledge of the Bank's procedures Mr Hussain must have known that what he said would be relied on by the credit manager, without further checking, in making a decision on each application.

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<sup>3</sup> *Jupiter General Insurance Co v Shroff* [1938] 3 All ER 67 (PC) accepted, obiter, in *Finsec v AMP* [1992] 1 ERNZ 280, 296 (EC).

[24] I am satisfied from the evidence of Ms Smith and Mr Mimilo, and having reviewed the documents provided, that Mr Hussain had repeatedly breached those requirements of the Bank's credit risk policy. These included instances of:

- a. Accepting valuation reports where the telephone, facsimile and PO Box numbers were altered so they were not the actual contact details for the valuer identified in the report; and
- b. Accepting valuation reports where the valuation on the front of the report for a property's market value was different from the valuation given in the body of the valuation agreement; and
- c. Processing loan applications before receiving the property's valuation report and accepting valuation reports after the loan had been drawn down; and
- d. Failing to properly verify income information from the customers.

[25] In most instances Mr Hussain had accepted from the customer a valuation report provided by facsimile or as a copy of an electronically scanned document. Such documents can more readily have details altered.

[26] A mobile mortgage manager diligently carrying out his or her duties would have checked with the named registered valuer as to whether she or he had provided a report for the named property. In doing so, he or she would have identified those instances where the contact details given for the valuers had been changed and thereby been alerted to the possible fraud. He or she would also have contacted the named employers and then likely identified that the customers were not employed on the basis claimed in their loan applications.

[27] During the investigation meeting the Bank produced the original versions of the valuation reports found in some of the relevant files kept by Mr Hussain. Having looked at those documents, I consider any ordinary reasonable person who has ever bought or sold a house and seen a properly prepared report by a valuer would have noticed something amiss about these particular reports. In some cases there were quite obvious alterations to the documents which would alert an ordinary reasonable person of the need to make further inquiries directly to the named registered valuer about whether the report was genuine and original.

## **The nature of the breaches**

[28] Taking that documentary evidence, my own observations, and the evidence of Mr Mimilo and Ms Smith all together, I am satisfied that the Bank has established that Mr Hussain breached the terms of his employment by not carrying out his duties with reasonable diligence and not in compliance with the requirements of the Bank's procedures. In doing so he prejudiced the safe and proper conduct of the employer's business.

[29] The Bank submits this evidence does more than demonstrate Mr Hussain was either careless or reckless in the way he carried out his duties. It invites the Authority to make the inference that Mr Hussain was knowingly involved in "*something more sinister*" – that he was a party to fraudulent applications by the identified customers. It submits the number of applications, the similar modus operandi in providing fraudulent inflated valuations, and the narrow timeframe in which this occurred all point to something more than an employee having been careless and trying to cover up mistakes after the event.

[30] I decline to make the inference sought by the Bank and do so for the following reasons.

[31] Firstly, the allegation of knowing participation in fraudulent activity is a very serious one. I was not able to hear directly from Mr Hussain in response to the allegation. While that was due to his own failure to attend the investigation meeting, I am reluctant to reach the suggested conclusion without further testing of the evidence for it.

[32] Secondly, I was told that the circumstances of these loan applications were also the subject of a Serious Fraud Office investigation which was still ongoing. I do not know but I assume those inquiries would concern the actions of the customers who sought and received loans as well the actions of Mr Hussain. While this determination makes findings about whether Mr Hussain was careless or reckless in how he carried out his duties as an employee of the Bank, it does not make any findings regarding whether those actions were fraudulent. That is a matter which may yet be the subject of evidence and a decision in another forum.

[33] Thirdly, it is not necessary for the Authority to make findings that Mr Hussain's actions were fraudulent before it can consider the remedies sought by the Bank. The remedies sought are available on the basis of findings that Mr Hussain breached his terms of employment by not exercising proper diligence in how he carried out his duties and that this amounted to actions which were careless or reckless of his employer's interests. Applying the notion of adjudicative economy, I proceed on the basis of those findings without needing to go further.

### **Did ANZ incur losses?**

[34] The Bank, through the evidence of Ms Smith, provided extensive evidence of losses it claims to have incurred as a result of Mr Hussain's actions. Its inquiries in August 2007 resulted in the Bank taking steps to stop the advance of money on at least five loans that had been approved on applications processed by Mr Hussain. However the Bank says that losses have occurred on 11 other earlier applications.

[35] Using one example, the Bank says it lent \$824,000 for purchase of one property but, after deducting revenue from its subsequent mortgage sale, was left with a shortfall of \$487,867. In another example \$790,000 was lent on a property with a current government valuation of \$415,000. Following mortgagee sale of that property, the Bank suffered a loss of \$423,620. Its calculation of losses includes deduction of real estate agent and legal fees.

[36] At the time of the Authority's investigation meeting the Bank's tally of losses amounted to more than \$3.5 million. It was still pursuing summary judgment and bankruptcy proceedings against some of the customers which may alter that figure. While this will affect any final quantification of loss, I find ANZ has suffered losses.

[37] Through its representative I was told the Bank does have insurance against such losses, although the cover is subject to stringent conditions. The policy requires the Bank to establish that the conspirators have been convicted of fraud or similar criminal charges. The policy has an excess of AUD 1 million. The question of quantum of damages would need to be the subject of a second investigation and determination if the Authority finds Mr Hussain liable for the Bank's losses. For that

purpose the Bank has already amended its claim for special damages to the amount of that excess, irrespective of whether it subsequently establishes cover under its insurance policy.

**Did Mr Hussain's breaches cause those losses?**

[38] To establish a right to the remedies sought, the Bank must establish that Mr Hussain's breaches of duty were sufficiently linked to its losses. It may establish that link if the losses suffered resulted from and probably would not have occurred but for his conduct. Such a result must be apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct.<sup>4</sup>

[39] Objectively it is clear that failing to properly check documentation provided in support of a loan application creates a real risk of loss to the Bank. Subjectively, the Bank's particular policy and requirements confirm that losses were contemplated in the event of such failure. Mr Hussain was clearly aware of this because, in the previous year, he got a commendation award from the Bank for identifying a situation where an applicant had altered verification documents.

[40] I also accept Mr Mimilo's evidence that Mr Hussain was adequately trained in the requirements of the Bank's credit risk policy, and the reasons for that policy. Earlier performance reviews and checks of his files had found Mr Hussain's work was satisfactory. Other files on which he worked in the same period of 2007 had documentation which was thorough, complete and properly checked. This confirms he understood and complied with the requirements in other parts of his work.

[41] He was also adequately trained about the risk of fraud and in the means of detecting and avoiding it. At the very least the inadequacies in the 11 identified files must have resulted from actions or omissions by him which were careless as to the consequences and which I accept were causative of the subsequent losses by the Bank. The prospect of such losses was a consequence readily apparent to any person of reasonable intelligence contemplating such conduct and the evidence shows no other independent or intervening cause of the losses suffered by the Bank. I find Mr Hussain liable for the losses incurred by the Bank in respect of the transactions

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<sup>4</sup> *Medic Corporation Limited v Barrett (No 2)* [1992] 3 ERNZ 977 (EC) at 983.

identified in the evidence.

## **Remedies**

[42] An inquiry to quantify damages may be the subject of a separate investigation and determination of the Authority, if the Bank wishes to pursue that option. As identified earlier, the Bank has “*capped*” its claim for special damages to the amount of AUD 1 million although its evidence to date suggests the real loss suffered may be greater.

[43] While that inquiry must await further evidence from the Bank quantifying its complete actual level of loss, the matter of penalties for breach of the terms of employment may be determined now. Penalties serve a different purpose from damages. An award of special damages in this case would be to compensate the Bank for the precisely quantified losses sustained. Penalties are imposed to punish wrongdoing and deter others from breaching their terms of employment in the manner Mr Hussain did.<sup>5</sup>

[44] How Mr Hussain breached his terms of employment was not technical or inadvertent. His actions and omissions in processing the loan applications involved breaches which were repeated and must have been deliberately careless or reckless in light of what he knew about the Bank’s procedures.

[45] One factor I also take into account is that Mr Hussain received commission on those applications. Mr Mimilo’s evidence was that Mr Hussain earned \$10,000 or more a month in commissions additional to his salary and for some of the applications in question had received commission of \$12,000. Mr Hussain was effectively profiting from his own breaches.

[46] Sections 134 and 135 of the Employment Relations Act 2000 (the Act) allows for the imposition of a penalty of up to \$5000 for each breach by an individual of his or her employment agreement. In this case the Bank was aware from August 2007 of the breaches by Mr Hussain and sought the penalties by May 2008, well within the required 12 month period: s135(5).

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<sup>5</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [47] (EC).

[47] The Bank has established various breaches of duty by Mr Hussain in respect of 18 transactions. As the conduct was repeated, it is appropriate to award a penalty on each transaction rather than a global award. I set the appropriate level as \$3000 for each, making a total of \$54,000.

[48] Under s136 of the Act I order that the whole amount of these penalties be paid by Mr Hussain to the Bank.

### **Further steps**

[49] If the Bank seeks a determination quantifying damages, it may now apply for a further investigation by the Authority. At such an investigation the Authority would consider the Bank's evidence on the actual losses resulting after mortgagee sales of the properties in questions and including associated costs such as real estate and legal fees.

### **Costs**

[50] Costs are reserved.

Robin Arthur  
Member of the Employment Relations Authority