# Bank of Tonga v Liava'a

Supreme Court, Nuku'alofa
Lewis J
C.644/93

24 April, 23 August 1996

*Banking Law - duties of borrower - joint liabilite*
*Contract - banking - security offered - privity.*

The plaintiff sued the representative of the defendant deceased estate for repayment of moneys claimed to be owed on and drawn form the deceaseds account.

Held:

1. The deceased had agreed to and assumed joint and several liability, with his son under a loan agreement, with the deceased's house being security.
2. The drawing of a cheque at the bank, when the drawer knows there are not sufficient funds in the account to meet it, may be taken as a request for an overdraft, and even when the drawer is not, as he should normally be, aware of the lack of funds.
3. Where the banker is in possession of a document where the client agrees to repay on demand, the banker would normally be entitled to take any action necessary to safeguard its interests, even if it prejudiced those of its borrower.
4. A banker, when agreements provide for it, is normally in privity of contract with each joint account holder.
5. The non-joinder of the other borrower (the son) therefore did not invalidate the proceedings.
6. The deceased must be seen as a borrower who was allowing his joint and several co-borrower to have the full access and operation of the loan accounts to which he was a party. The deceased gave the security jointly with his son on that basis (of further advances by the plaintiff) on a number of occasions. There was nothing inequitable or oppressive about the circumstances leading to the loan agreement, although the consequences to the defendant may be dire.

(A successful appeal from this judgment is reported in 1997 Tonga LR).

Cases considered : Catlin v Cyprus Finance Corp [1983] QB 759

Counsel for plaintiff : Mr Appleby
Counsel for defendant : Mr Niu

**Judgment**

The Plaintiff is a banker and the Defendant conducts these proceedings as the representative of the estate of the deceased who died on 16 January 1993. The deceased is hereinafter referred to as "Tongotongo". The Plaintiff and the Defendant agree that the following narrative represents the factual basis for the application of legal principle in this action. (The facts are not set out in full here).

Siosiua Tu'iono Liava'a (Tu'iono) is the son of Tongotongo. He operated a cheque account with the Plaintiff on 24 August 1987. The account was numbered 01 200133 02019.

On 24 August 1987 Tu'iono requested from the Plaintiff a temporary overdraft facility [P1]. On 25 August 1987 a loan agreement and receipt were signed by Tu'iono and Tongotongo for the amount of T$6,000.00 plus interest at 10% for the purpose of an overdraft facility - (the first overdraft).

Counsel have defined the issues for determination. The issues are defined by the following questions:-

1. Is the Defendant liable for cheques presented to the account between 30 October 1987 and 6 November 1987?
2. Is the Defendant liable for:-
   (a) Drawings and
   (b) Interest
   Debited to the account after 16 November 1987?
3. Is the Defendant liable for:-
   (a) Drawings and
   (b) Interest
   That exceeded the amount of $15,000.00 in the loan agreement dated 6 November 1987?
4. Is the Defendant liable for:-
   (a) Drawings in excess of the agreed limit of $25,000.00
   (b) Interest thereon?
5. Is the Defendant liable for:-
   (a) Amounts debited to the account up to $15,000.00 plus interest less payments; or,
   (b) Amounts debited to the account plus interest less payments, plus further amounts debited to the acocount up to a limit of $15,000.00?

The nature of the liability of the estate of the Defendant will derive from the terms of the agreements which the deceased entered with the Plaintiff. The evidence of the dealing between the plaintiff and Tongotongo is as follows.

Tongotongo was first drawn into the matters before the court in an interview recorded in the Plaintiff's diary note dated 24.8.87 [Exh P1]. Thereafter Tongotongo appears to have freely entered into the overdraft arrangements by signing the loan agreement [Exhibit P4 - P5 ON] 25 August 1987.

There is no doubting that Tongotongo assumed liability equally with Tu'iono in the loan agreement Exh P4.

On 30 October 1987 the two men made an application for bridging finance of $15,000.00 for the purchase of the hotel to be cleared by 16 November 1987. Both signed.

Both assumed joint and several liability.

Loan agreements P4, P5 and P6 provided that Tongotongo's dwelling at Tofoa was security against performance by the borrowers under the loan agreements.

It is submitted at least by some commentators that "providing that the banker is in possession of a document by which the customer agreed to repay on demand, the banker would normally be entitled to take any action necessary to safeguard his interests, even if it prejudiced those of his borrower. The drawing of a cheque or the accepting of a bill payable at the bank, when the drawer knows there are not sufficient funds in the account to meet it, may be taken as a request for an overdraft and also when the drawer is not, as he should normally be, aware of the lack of funds." [Paget's Law of Banking Tenth Edition 1989 PP.182, 183.]

I take the law to be as presently advised that a bank where agreements provide for it, is "normally in privity of contract with each joint account holder." [Paget Supra 186].

In Catlin v Cyprus Finance Corporation (London) Ltd. [1983] QB 759 Bingham J among other thing said (when considering the liability of a banker charged with negligently failing in its duty to not pay monies to a husband and wife jointly and severally depositing in their account without their jointly signing a withdrawal application),

> "The defendants agreed to honour instructions signed by both account holders. This no doubt imported a negative duty not to honour instructions not signed by both account holders. This duty also could, in theory, have been owed jointly, but it must (to make sense) have been owed to the account holders severally because the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other. A duty on the defendants which could only be enforced jointly with the party against the possibility of whose misconduct a safeguard was sought and where the occurrence of such misconduct through the negligent breach of mandate by the defendants would deprive the innocent party of any remedy, would in practical terms be worthless. Indeed, it would be worse than worthless, because a customer would reasonably rely on the two signatures safeguard and refrain from active supervision of the account, only to find when loss (allegedly irreparable) has resulted that the reliance was misplaced."

In the present action there has been a non-joinder of Tu'iono. As the commentator notes (Paget Supra 191) the adoption of the so-called Catlin solution disposed of an objection taken by the defendant bank in Catlin that the non-joinder of Mr Catlin invalidated the proceedings. In my opinion the absence of Tu'iono in the present proceedings has its parallels in Catlin.

The immediate distinction between Catlin and the present case is that whereas in Catlin the plaintiff was suing the bank, here the bank is attempting to enforce joint and several liability against Tongotongo who was never contemplated as a joint venturer or cheque signatory. He merely put up his house as security against Tu'iono's loan arrangements. The second distinction is that just as one may have expected, there was never mention of the necessity or plain need to have Tongotongo as a joint signatory to the agreement P4-P5 Indeed the agreement makes no mention of how advances under the agreement were to be moved about. Tongotongo therefore must be seen as a borrower who was allowing his joint and several co-borrower to have the full access and operation of the loan accounts to which he was a party.

The plaintiff advanced funds on the basis that there was security. Tongotongo must

be seen to have given the security jointly with his son on that basis not once but on a number of occasions on the facts as I have them before me. Although this court is bound to consider and do equity I am unable to see that there is anything inequitable or oppressive about the circumstances leading to and the existence of the present loan agreement although the consequences to Tongotongo may be dire.

I have considered the arguments which counsel have placed before the court. Turning to the questions asked by Counsel. On the facts as I have them before me and in my opinion the answers ought to be and are as follows:-

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1. Yes
2. (a) Yes
   (b) Yes
3. (a) Yes
   (b) Yes
4. (a) Yes
   (b) Yes
5. (a) No
   (b) Yes