Liava'a v Bank of Tonga

Court of Appeal
Hampton CJ, Morling & Burchett JJ
App. 18/96

13 & 20 June 1997

Banking - guarantee - explicit terms - reductions
Contract - terms - construction

This was an appeal against a judgment holding the father (now deceased) responsible in full for the full amount owed to the Bank by his son, on the basis of a loan agreement executed by both father and son (in November 1987).

Held, allowing the appeal in full.

1. The father and son were not joint account holders.
2. The father never assumed any liability to guarantee the son's debit balance in the bank account, otherwise than in accordance with the agreement of 6 November 1987.
3. That agreement by its terms meant the father guaranteed the repayment of the son's overdraft up to $15,000 provided that limit was reached by 16 November 1987.
4. As at 16 November 1987 the debit was $9194.97, and that was the extent of the father's liability.
5. The father was entitled to have the benefit of payments made into the overdraft account since 16 November 1987, the general rule applying, namely that payments made in reduction of a running account are deemed to have been made in reduction of the account as from its inception. The father's debt had been extinguished.

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Appleby

Judgment

This appeal has been brought in the name of "Siosifa Tongotongo Liava'a (deceased)". The deceased died in early 1993. On 20 August 1993 an application was made under Order 9 Rule 6(3) of the Supreme Court rules 1991 for an order that Vaha'i Foliaki be appointed to represent the estate of the deceased. It is unclear from the Court records before this Court whether the appointment has been made. If it has, the record should be amended accordingly. If not, the order should be made promptly and the Court record amended in appropriate terms.

The respondent bank brought proceedings against the deceased ("Tongotongo") to recover money's said to be owing by him to the bank under a document styled "Loan Agreement" executed by him and his son Siosiua Tu'iono Liava'a ("Tu'iono"). The facts giving rise to Tongotongo's alleged indebtedness to the bank were not in dispute at the trial. The following account of them is taken from Lewis J's judgment.

Siosiua Tu'iono Liava'a (Tu'iono) is the son of Tongotongo. He operated a cheque account numbered 01 200 133 0201 with the bank.

On 24 August 1987 Tu'iono requested from the bank a temporary overdraft facility. 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).

On 16 September 1987 $7,000.00 was paid into the account and the first overdraft was cancelled.

On 30 October 1987 Tu'iono requested a temporary overdraft facility from the bank for the sum of $15,000.00 as bridging finance for the purpose of an hotel known as the Paradise International Hotel at Vava'u. On 6 November 1987 a loan agreement was signed by Tu'iono and Tongotongo for the amount of T$15,000.00 plus interest at 10% for the purpose of an overdraft facility which was to be cleared by 16 November 1987.

The account was operated by Tu'iono alone and between 30 October and 6 November 1987 cheques to the sum of T$1,721.40 were presented and honoured by the bank which brought the balance of the account from $20.48 credit on 30 October to $1,700.92 debit on 5 November 1987.

On 2 November 1987 an agreement for the sale of the hotel was signed between Carter E. Johnson as seller as Siosiua T. Liava'a and nominees as buyers.

On 12 November 1987 Tu'iono paid Carter Johnson a deposit of US$10,000.00 pursuant to the agreement. On the same day Tu'iono requested the bank to increase the overdraft limit to $20,000.00. Tongotongo was neither present nor was he consulted about the increase.

On 15 November 1987 the account balance stood at $9,194.97 debit. On 16 November 1987 Tu'iono requested the bank by telephone to increase the overdraft limit to $25,000.00.

On 23 November 1987 the account had not been cleared and the balance stood at $9,746.07. On 30 November 1987 Tu'iono drew a cheque to purchase a US$10,000.00 bank draft and the balance thereafter stood at $27,069.11.

On 9 December 1987 the bank cancelled the overdraft. Tu'iono then told the bank that the overdraft would be cleared by the end of 1987. The account balance at that time stood at $27,349.11.

The last activity on the account by Tu'iono was on 8 and 9 June 1988 when he

presented cheques for T$554.70 and T$200.00 which were subsequently reversed. The account balance at 10 June 1988 stood at $34,812.17.

The bank made requests of Tu'iono that he clear his overdraft on several occasions between December 1987 and March 1990.

Lump sum payments were made to the account by Tu'iono and another family member, Sharon, in the amounts of $700.00, $4,900.00, $1,000.00, $200.00, $3,023.33, $5,000.00, $1,000.00 making a total of T$11,823.33.

On 26 July 1988 Tongotongo was advised by the bank that if Tu'iono did not clear the account in the following month his houses which were pledged under the loan agreement would be advertised and sold. On 10 August 1988 Tongotongo advised the bank that he was prepared to repay the debt from his pension since it had difficulty in collecting from Tu'iono. On 27 April 1989 he commenced payments at a rate of $50.00 per fortnight. By 16 August 1989 together withother payments, a total of $14,373.33 had been paid in reduction of the account, of which T$2,550.00 came from Tongotongo's pension. Tongotongo ceased payments altogether on 13 November 1991 because the bank had taken action against Tu'iono in New Zealand.

On 3 September 1991 Tu'iono was declared bankrupt in New Zealand. He had lived in New Zealand since about July 1986.

On 12 September 1991 Peter Macdonald, Solicitor for the bank, sent a letter of demand on behalf of the plaintiff. Since 8 June 1988 the account has accrued interest and examination fees and as at 30 June 1994 the balance stood at $39,312.59.

The loan agreement executed on 6 November 1987 provides that the liability of Tu'iono and Tongotongo should be joint and several. The purpose of the loan is expressed to be "Overdraft Limit".

The agreement further provides (in part):-

> "The Bank agrees to lend the Borrower the sum of $15,000.00 Pa'anga (hereinafter called 'the Agreed Sum') . . . . . The Borrower agrees to make repayments of . . . . . " The space following these words is left blank. However, the words "To be cleared by 16/11/'87" are prominently typed in the blank space. The document continues: "The first repayment shall become due . . . . . ." These words are again followed by a space in which appear the words. "To be cleared by 16/11/'87".

The loan agreement goes on to provide that "in the event of failure by the Borrower to fulfill his obligations under this Agreement then the balance owing becomes payable on demand ...".

Lewis J. concluded on those facts that the bank was entitled to recover from Tongotongo the full amount owed to it by Tu'iono. His Honour appears to have arrived at this conclusion because he thought that Tu'iono and Tongotongo were joint account holders and that accordingly Tongotongo was jointly and severally liable with his son to pay the bank the amount by which the account was in debit i.e. account no.01 200 133 0201.

However, His Honour was mistaken in his view that Tongotongo and Tu'iono were joint account holders of that account. It is clear from the evidence that account was operated by Tu'iono alone. He was the only person who drew cheques on the account and Tongotongo never assumed any liability to guarantee payment of the debit balance in that account, otherwise than in accordance with the agreement he signed on 6 November 1987.

All that Tongotongo agreed to do was to pay money to the bank in accordance with that agreement. There is no warrant for holding Tongotongo liable to indemnify thebank against unlimited losses incurred by it in its separate dealings with Tu'iono in respect of the latter's personal cheque account i.e. account no. 01200 133 0201 which Tongotongo never guaranteed.

The question therefore arises as to the amount of Tongotongo's indebtedness (if any) to the bank under the 6 November 1987 loan agreement. It is important to note that the purpose of the agreement is expressed to be "Overdraft Limit of $15,000 ... to be cleared by 16/11/'87." We take these words to mean that Tongotongo agreed to guarantee repayment of the overdraft up to a limit of $15,000 provided that limit was reached by 16 November 1987. He did not agree to pay the bank $15,000 if it chose to advance that sum to Tu'iono after that date.

It is common ground that as at 16 November 1987 the debit in Tu'iono's account was only $9,194.97. It was submitted by Mr. Niu for the appellant that since Tu'iono owed the bank $1,700-92 before the loan agreement was executed on 6 November 1987, this amount should be decucted from the sum of $9,194-97. It was said that the $1,700-92 was not covered by the loan agreement. We do not think this argument is valid. We think the better view of the evidence is that Tongotongo agreed to guarantee repayment of the debit balance, whatever it was, provided it did not exceed $15,000 and further provided in effect, that the overdraft was crystallised as at 16 November 1987.

The remaining question is whether the appellant is entitled to have the benefit of payments made into the overdraft account since 16 November 1987. In our opinion he is. It may well have been open to the bank to allocate payments made thereafter to amounts advanced to Tu'iono after the same date. But there is no evidence that it did. In those circumstances we think the general rule applies, namely that payments made in reduction of a running account are deemed to have been made in reduction of the account as from its inception. Since the bank has received much more than the amount outstanding as at 16 November 1987, the appellant's debt has been extinguished.

The appeal is allowed and the decision of the trial judge set aside. In lieu thereof there should be judgment for the appellant. The respondent must pay the costs of the trial and of the appeal, to be agreed or taxed.