IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.473/98

BETWEEN : ***MBf BANK LIMITED*** - ***Plaintiff;***

AND : ***1. SAIA VAKAMEILALO*** - ***Defendants.***
2. SEPETI VAKAMEILALO

BEFORE THE HON. CHIEF JUSTICE WARD

Date of Hearing: 28 and 29 October 1999
Date of Judgment: 5 November 1999.

Counsel: Mr L. Niu for Plaintiff
Mr S. Tu'utafaiva for Defendants

Judgment

The plaintiff is a commercial bank and seeks to recover a sum of money loaned to the first defendant and secured by a guarantee entered into by the second defendant.

The first defendant was intending to grow squash pumpkins in 1994 for export to Japan. As with many of the growers he sought financial assistance in order to buy seed and fertiliser and to pay his workers. It was usual for the growers to register with a particular exporter and to supply their squash to that exporter to export. In that year, the first defendant was registered with an export company, IPC, to grow two acres.

He approached the plaintiff for a loan of $1,600.00 in April of that year and the agreement was that it should be repaid in one lump sum from the proceeds of the sale of his squash in Japan.

The terms were set out initially in a letter of offer dated 17 June 1994. The terms of the loan and the manner of repayment were all stated and included a schedule stating the stages at which the loan funds would be released. That

letter of offer was signed by the first defendant and the bank on 24 June and, the same day, they signed the loan agreement. The security for the loan was the defendant's dwelling house together with a personal guarantee from the second defendant who signed the letter of guarantee that day also.

On 2 July the plaintiff and the first defendant signed a supplementary agreement which, unlike the letter of offer and the loan agreement, was written in Tongan. It was an authority from the first defendant for the bank to pay the loan funds to the exporter, IPC, and for them to "apply the payments as borrowing debt for (the first defendant's) squash loan account".

It was also a term of the supplementary agreement that the bank should "pay all the squash growing loan debt and any other loan debt of the borrower that was agreed or understood to be repaid in full from the proceeds of the selling of the squash".

There is no dispute that the loan money was paid to the first defendant by way of IPC. Unfortunately 1994 was not a happy year for the squash industry and the first defendant was one of those who suffered. He produced the squash but the exporter did not export it. The inevitable result was that he had no proceeds from the sale of his squash with which to repay the loan.

He paid nothing and eventually on 30 October 1997 the bank's lawyer sent a letter demanding payment of the loan, which by that time was $2,195.73. The following day a letter was sent to the second defendant demanding payment from him also.

To this day, nothing has been paid by either defendant.

The first defendant gave evidence. The second did not and only attended through his counsel. The first defendant explained how he had initially contacted IPC about growing squash and had registered with it. He was advised to go to the bank and arrange finance. It was accepted that the arrangement whereby the bank paid the money to the exporter was used for a number of the growers registered with IPC and it appears many of them went to the bank and applied for the loan on the same day as the first defendant. The first defendant told the lady in the bank that he was registered as a grower with IPC and was then given the papers to sign. These papers must have been the original application and, when the bank approved it, the letter of offer was passed to the defendant.

The first defendant was clear that the money was to be paid by the bank to IPC and would be paid by it to him as he completed the various stages of the cultivation. He was fully aware he would have to repay the loan. He told the Court that he thought he would pay it himself out of the proceeds of the sale of the squash whereas the plaintiff claimed the supplementary agreement meant

that IPC would pay the bank and then pass the balance to the grower. Whichever is the correct version is not important because there were no proceeds from the sale of the squash and the first defendant told the Court that there was never any discussion with the bank about such a possibility. He was asked what, when he arranged the loan, he had thought would be the position if there were no receipts from the squash and he replied that he had no other way to pay. He only thought of the squash.

The second defendant is the first defendant's son and is a civil servant in the Ministry of Finance. The first defendant said he did not know his son was guaranteeing the loan. He said that they were all told to bring a civil servant to sign their papers and so he asked his son to come. I do not believe him about his lack of understanding of the nature of his son's involvement but it matters not because his son has not given evidence to that effect. I have absolutely no doubt that a person in his position would undoubtedly have known what he was doing when he signed the form. It is clearly headed "Letter of Guarantee" and the second defendant signed under the words "Signature of Guarantor".

The plaintiff's case is clear. This money was loaned under a normal loan agreement and has not been repaid in accordance with the terms of the agreement. The second defendant signed a guarantee and, as the loan has not been paid, is liable to pay. The defence does not dispute that the money was paid and the first defendant told the court more than once that he accepts he is the person who is liable to repay the loan. No evidence has been called for the second defendant to dispute his liability under the guarantee.

Defence counsel bases his case on two propositions.

The first is that the agreement was not just expressed in the loan agreement but was also set out in and subject to the terms of the letter of offer, the supplementary agreement and any oral understanding or agreement that was part of an agreement between the defendant, the bank and IPC. I can deal with the last point briefly. There was no evidence of any agreement between the first defendant and the IPC beyond the registration with IPC as a grower and the first defendant's authorisation to the bank under the supplementary agreement. IPC is certainly not a party to the loan agreement despite being mentioned in the supplementary agreement. That was no more than an authorisation to the bank to pay to IPC the money loaned to the first defendant.

Counsel suggests to the Court that, as the agreement stated the loan was to be repaid from the proceeds of sale of the squash and as the first defendant grew the squash, he had performed his part of the agreement with the bank and IPC. This is a misstatement of the position. The documents clearly show that this money was a simple loan. The bank accepted that repayment would have to await the proceeds of the sale but it did not in any way agree that it was

conditional on there being such money. Whether or not IPC let the defendant down or breached any other agreement is nothing to do with this case.

Counsel also points to the suggested discrepancies between the terms for repayment in the letter of offer, the loan agreement and the supplementary agreement. The former states:

> "Repayment: Repayable by one lump sum payment from the sales proceeds of Squash exports on or before January 31 1995...."

The loan agreement states in the body of the agreement:

> "The Borrower agrees to repay ON DEMAND to the Bank..." However the agreement is stated to be subject to special conditions set out in the schedule, one of which states:
> "Repayable by one lump sum payment from the sales proceeds of Squash exports on or before January 31 1995....'

The wording of the supplementary agreement generally is not at all clear but on this aspect it reads:

> "The borrower and the Bank agree and the borrower authorises the Bank:...
> 2. To pay all the squash growing loan debt and any other loan debt of the borrower that was agreed or understood to be repaid in full from the proceeds of the selling of the squash."

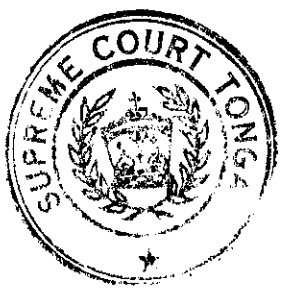
I do not accept counsel's suggestion that these are contradictory or fatally inconsistent. I certainly do not accept they mean that the money is not yet due and so the defendant has not breached the loan agreement as a result. The bank made this loan with the clear agreement that it would be paid back as soon as the sales proceeds of the squash were in hand. It also reserved its right to demand repayment at any time.

Counsel's second argument is that the bank and the first defendant relied on IPC to export the squash. The defendant did his part and grew the squash. If it had been exported, there would have been money to repay the loan. He suggests that the bank is clearly the main loser but the first defendant also loses having given his time and energy to grow the squash. IPC, on the other hand, gains. Why, he asks does the bank not claim against IPC. The answer is clear as I have already stated. There is no agreement between the first defendant and IPC in relation to this loan agreement and IPC is not a party to this action. The whole arrangement may well have hinged on the manner in which IPC dealt with the first defendants' squash and set the date repayment was due but it went no further than that.

The plaintiff has clearly established the loan and the liability of the first defendant to repay it. I find no merit in the defence contentions and I am satisfied the defendant is liable to repay the money as he conceded in evidence.

The second defendant signed a guarantee the terms of which are not disputed and there is nothing to suggest he is not liable on his father's default.

I give judgment to the plaintiff against the first and second defendants for the sum of $2,195.73 with interest at 10% p.a. from 31 October 1997. The defendants shall also pay the plaintiff's costs.



DATED: 5th November 1999.

CHIEF JUSTICE