IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA No: 7/10

BETWEEN	**THE ATTORNEY GENERAL** on behalf of the Government of the Cook Islands
	Appellant
AND	**APEX AGENCIES LIMITED,** a duly incorporated company with its registered office at Rarotonga
	Respondent

Coram:	Barker, P Fisher, JA Paterson, JA
Hearing:	12 July 2010 (at Auckland)
Decision:	19 July 2010
Counsel:	Solicitor-General, Mr T Elikana and Dr A Frame for Appellant P J Dale and A Manarangi for Respondent

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JUDGMENT OF THE COURT

Solicitors:	Crown Law Office, Rarotonga for Appellant A Manarangi, Rarotonga for Respondent

INTRODUCTION

[1] This is an appeal from a judgment of Weston J (as the Chief Justice then was) delivered on 19 May 2010, after a two-day hearing in the previous month.

[2] The litigation arises out of a settlement agreement between the Crown in right of the Cook Islands (represented by the Attorney General) as Appellant and Apex Agencies Limited, the Respondent. This agreement was the result of a mediation conducted in Rarotonga on 11 December 2009 whereby the Government of the Cook Islands, represented by the then Minister of Finance, Sir Terepai Maoate and advised by Mr C H Toogood QC of the New Zealand Bar, agreed to settle litigation between the parties on the terms contained in a detailed settlement agreement signed on behalf of both parties.

[3] The principal components of the settlement agreement were:

(a) a payment by the Crown to the Respondent of $1.75 million; and

(b) an agreement by the Crown to "top up" the income of the Respondent in such a way that it would make a profit of $1.2 million for each of the ensuing 8 years.

[4] In the litigation which the settlement agreement purported to end, the Respondent had alleged that the Crown had breached an 'heads of agreement', entered into in December 2008, to purchase a $5.16 million tank farm and associated assets owned by the Respondent. As part of the settlement agreement, the 'heads of agreement' were cancelled and the Crown agreed to settle the Respondent's claim, which the Respondent had quantified at $10.2 million, a figure which the Crown did not accept.

[5] It is necessary to set out relevant terms of the mediated settlement agreement.

> "Introduction 1: "*The Government and TOA entered into a Heads of Agreement dated 4th December 2009 for the sale and purchase of TOA's fuel depot on Rarotonga.*"
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> Introduction 2: "*Triad Pacific Petroleum Limited ("Triad") issued proceedings in the High Court of the Cook Islands under Plaint 2/09 to which the Government (represented by Deputy Prime Minister Sir Terepai Maoate and several government officials and agencies) were parties subsequently joined by TOA ("the Proceedings")*
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> *"1 It is agreed that the Heads of Agreement shall be cancelled and to have, and have had, no effect whatsoever."*

"4 The Government shall pay to TOA the sum of $1,750,000 (the "Sum") in full and final settlement of any claim whatsoever that has been made, or may have been made by TOA arising out of or in connection with the Heads of Agreement, in the following manner:

(a) the Sum shall be transferred to an account with the ANZ in the name of the Government on or before 18 December 2009;

(b) the Government shall direct the ANZ –

1. that the sum be held for the benefit of TOA;

2. that the sum shall not be withdrawn from the account without the consent of TOA;

3. on or before 31 March 2010, the Government will instruct ANZ Bank that the Sum be transferred to TOA as TOA directs."

"6 As soon as practicable, (in any event not later than 31 March 2010) TOA and the Government shall enter into a new Fuel Pricing Template ("the New Template") incorporating the terms of the current Fuel Pricing Template between the Government, TOA and Exxon Mobil ("the Old Template") as far as may be applicable and subject to the following variations:

(a) The terms of the Old Template shall be varied to include such terms of the Pricing Template agreements attached as schedules 1 and 2 to the Heads of Agreement together with such other terms as the Parties deem appropriate to provide certainty in the application of the New Template and the process for review thereof.

(b) The parties shall agree on the detailed terms of an agreement for the application of the New Template.

(c) The New Template shall replace the 20% ROI guarantee and related provisions with a guaranteed minimum EBITDA (Earnings Before Interest, Tax, Depreciation and Amortization) of $1,200,000 per annum and such other provisions as may be necessary for the application of the guarantee, including, but not limited to:

(i) payment of an advance on the guarantee, subject to bi-monthly reconciliation of $100,000 per calendar month

(ii) the New Template shall be in force for a period of 8 years

(iii) Exxon Mobil shall not be a party to the New Template

(iv) TOA shall not, and TOA shall procure that Exxon Mobil shall not, make any claims or take any proceedings whatsoever against the Government or any of its officers, employees or agents, arising out of or in connection with the operation, application or interpretation of the Old Template or any predecessor fuel pricing arrangements."

[6] In the proceedings before Weston J, the Crown had submitted that it was *ultra vires* for the representatives of the Crown at the mediation to have agreed to the "*top up*" provision because of the provisions of Section 59 of the Ministry of Finance & Economic Management Act 1995-1996 ("the Act"). It was submitted that because the "*top-up*" agreement constituted a "*guarantee*" as mentioned in Section 59, the Crown representatives were not entitled to enter into that arrangement without the specific approval of the Cabinet given under Section 60 of the Act.

[7] Neither in the Court below, nor in this Court, did the Crown seek to impugn the good faith of its negotiating team. Counsel acknowledged that the negotiators were attempting in good faith to settle the Respondent's litigation against the Crown. However, that does not alter the fact that the Crown is obliged to take the point if there had been no jurisdiction for its representatives to have entered into the "*top-up*" agreement. Counsel for the Respondent did not agree to the contrary but submitted that that "*top-up*" agreement did not come within Section 59.

[8] Weston J disclaimed any attempt by the Court to determine whether the settlement was commercially good or bad or commercially efficacious. This Court takes a similar view.

[9] The Act followed similar legislation in New Zealand, with some variations. It did not entirely adopt the New Zealand model which was far more comprehensive, particularly in its definition of what was to be covered by the Cook Islands Section 59 (i.e. Section 58A of the then New Zealand Act).

[10] The sections of the Act read as follows:

> *"59. Authority for the giving by the Crown of guarantees and indemnities – Except as expressly authorised by any Act, it shall not be lawful for any person to give a guarantee or indemnity that imposes an actual or a contingent liability on the Crown."*
>
> *"60. Power to give guarantees and indemnities – (1) the Minister on behalf of the Crown may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of any person, organisation, or Government but only with the approval of –*
>
> *(a) Cabinet; and*
>
> *(b) on the advice of the Financial Secretary; and*

> *(c) where such guarantee or indemnity is consistent with the fiscal responsibility objectives of this Act.*
>
> *(2) The Minister shall state at the next sitting of Parliament following the granting of a guarantee or indemnity why it was necessary in the public interest to grant the guarantee or indemnity as the case may be and shall provide an assessment of the risks associated with the guarantee-:or indemnity.*
>
> *(3) Any money paid by the Crown pursuant to any guarantee or indemnity given under this section shall constitute a debt due to the Crown from' the person, organisation, or Government in respect of whom the guarantee or indemnity was given, and may be recoverable as such in any Court of competent jurisdiction."*

[11] Weston J held that the word "guarantee" in Section 59 was used only to the sense of a guarantee being defined as "*a contract to bind any person to answer to another person for the debt, default or liability of a third person*". The "*top-up*" agreement did not come into this category of meaning for the word "*guarantee*". Counsel did not argue that the "*top-up*" provision was an "*indemnity*".

[12] Weston J also considered further arguments:

(a) whether the prohibition in Section 59 is confined to "any person" other than the Crown and therefore has no application to contracts entered into by the Crown acting through one of its Ministers

(b) whether a letter setting forth the Cabinet's instructions to the negotiating team issued to them prior to the mediation, was sufficient compliance with Section 60 of the Act; and

(c) whether the agreement for the Crown to pay the Respondent $1.75 million was severable from the rest of the settlement agreement.

[13] The Judge considered that the application of Section 59 was unaffected by any distinction to be drawn between the Crown and other persons acting on its behalf; that Section 60 applied because of the wording of the instructions from the Cabinet; and that the settlement agreement was incapable of being severed.

[14] In view of the decision this Court has reached in relation to the meaning of "guarantee" in Section 59, it is not necessary to consider whether Weston J was correct in the views he reached on those subsidiary matters.

Was cl 6(c) of the settlement agreement a "guarantee" for the purposes of Section 59?

[15] The essential features of cl 6(1)(c) of the settlement agreement were not in dispute:

(a) Its object is to ensure that in each of the eight years to which the agreement applies, TOA will make a profit of $1.2 million whether through its trading activities or, where necessary to achieve that outcome, through top-up payments by the Crown.

(b) The Crown's liability (if any) in any future year was unknown at the time of the contract since it would turn on whether and to what extent TOA's actual profit in that year fell short of $1.2M.

(c) The Crown was the sole debtor under cl 6(1)(c) - no other party had any primary or collateral liability in respect of the same debt.

(d) The Crown could heavily influence the question whether TOA attained the target profit by ensuring that it placed sufficient fuel orders with TOA.

[16] In short, the Crown's liability was the open-ended obligation of one party to a contract to pay a sum or sums uncertain to the other party over a defined period. The question is whether an obligation of that type is to be categorised as a "guarantee" for the purposes of Section 59.

[17] Mr Frame did not suggest that such an obligation qualified as an "indemnity" under that section. He relied upon "guarantee". He submitted that in this context "guarantee" means no more than "an assurance as to future events that results in an actual or contingent liability on the Crown". If that meaning were adopted cl 6(1)(c) would be captured by Section 59 and therefore unlawful.

[18] Mr Dale submitted that, in this context, "guarantee" was a much more narrow concept. In his submission it was "a contract by any person to answer to another person for the debt, default, or liability of a third person".

[19] It will be convenient to refer to those two meanings of "guarantee" as the "wide definition" and the "narrow definition" respectively. In choosing between the two, counsel traversed three central matters:

(a) The predominant meaning of "guarantee" in a legal context;

(b) The scope of the prohibition if the wide meaning is adopted; and

(c) The relationship between ss 59 and 60.

[20] We deal with these in turn.

(a) The predominant meaning of "guarantee" in a legal context.

[21] The word "guarantee" is clearly capable of more than one meaning.

[22] As Mr Frame pointed out, "guarantee" is often used in the broad sense he contended for (see, for example, *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770). It has also been used in many statutes in the broad sense (as, for example, the Wine Act 2003 (NZ) s 42(3)).

[23] We also accept Mr Dale's submission that in a strictly legal context the word "guarantee" is more usually associated with the narrow meaning (see, for example, 20 Halsbury (4th Ed) 101; Statute of Frauds 1677; Contracts Enforcement Act (NZ) s 2(1)(d)). As he pointed out, whole legal text books have been devoted to the subject in the narrow sense. There have also been countless decisions about "guarantees" in the narrow sense. When a lawyer uses the word "guarantee", particularly in association with the phrase "the giving of a guarantee" the narrow sense is normally intended.

[24] Everything therefore turns on the context. The present context includes two features worth noting. One is that the full phrase used in Section 59 is "give a guarantee". The other is that "guarantee" has been used in association with other legal expressions of a technical nature - "indemnity" and "actual or a contingent liability". On the whole, these make the narrow meaning more likely than the broad one, although in themselves they are far from decisive.

(b) The scope of the prohibition if the wide meaning is adopted

[25] The general prohibition in Section 59 concerns the giving of "a guarantee or indemnity that imposes an actual or a contingent liability on the Crown". As previously noted, Mr Frame submitted that in this context " 'guarantee' means an assurance as to future events that results in an actual or contingent liability on the Crown.

[26] A difficulty with that interpretation is to set the boundaries upon the scope of the prohibition that would result. As the long title to the Act indicates, the purpose of the Act is "to establish effective economic, fiscal and financial management and responsibility by Government". The implied purpose of Section 59 is that, as far as may be practicable, the public revenues of the Cook Islands should not be exposed to unlimited and unappropriated liabilities. On the other hand the powers of the Government should not be so limited that it could not enter into contractual commitments to pay sums of money in the future at all. Nor would one think that in every case, regardless of the nature or magnitude of the sum involved, the Government would be precluded from entering into a contract where the extent of the financial obligation was undefined in finite terms. Inevitably, therefore, some balance is required between prudent fiscal management, on the one hand, and permitting the Government to conduct its business in a practical way, on the other

[27] The meaning for which Mr Frame contended was that, in this context, " 'guarantee' means "an assurance as to future events that results in an actual or contingent liability on the Crown". In a contractual context the "assurance as to future events" must mean the promise to pay a sum of money at a future time. Nor could there be any limitation to contingent liabilities. Given the intended contrast with "contingent", "actual" seems to be directed to liabilities which are irrevocably established by the contract itself regardless of future events. The result of Mr Frame's definition of "guarantee" would be that subject to express exceptions, the Crown would be unable to enter into a simple contract to buy goods or services, at least if the purchase price were not articulated in the contract in finite terms Nor is there any qualification in Section 59 authorising contracts for the purchase of goods or services where the funds required for that purpose have already been generally or particularly appropriated by Parliament. It seems highly unlikely that in enacting Section 59 Parliament intended such a sweeping prohibition.

[28] It is true that Section 59 provides for exceptions ("except as expressly authorised by any Act"). One such exception is clearly found in Section 60 of the same Act which provides for Ministers to provide guarantees and indemnities under strictly controlled circumstances. There is the potential for Parliament to create others. However it was not suggested that at the time of the Act, or since, sufficient further exceptions have been created to permit the Government of the Cook Islands to continue to carry out its function if the broad meaning of "guarantee" were to be adopted. As Weston J said, the meaning advocated for by Mr Frame is "so broad that the Crown's day-to-day operations would be handicapped beyond any sensible notion of financial prudency". This strongly supports the narrow meaning.

(c) The relationship between Sections 59 and 60

[29] It was not disputed that in Section 60 the word "guarantee" is used in the narrow sense of a collateral contract to answer for another person's primary liability. That follows from Section 60(3) which gives the Crown a right of indemnity from the primary debtor if money is paid by the Crown under its guarantee. As Weston J pointed out, one would expect "guarantee" to have the same meaning in ss 59 and 60 which clearly have a close inter-relationship. That in itself points to the narrow meaning.

[30] There is a further way in which the relationship between Sections 59 and 60 suggests that "guarantee" is to be given the narrow meaning in both. The Crown has advocated for a broad meaning of "guarantee" to support the purpose of the Act "to establish effective economic, fiscal and financial management and responsibility by Government". The strict conditions surrounding the giving of an effective guarantee under Section 60 are clearly designed to ensure that level of financial responsibility. Guarantees can be given only by Ministers on behalf of the Crown. It must appear to the Minister to be necessary in the public interest. The guarantee must be approved by Cabinet on the advice of the Financial Secretary. The guarantee must be consistent with the fiscal responsibility objectives of the Act. The Minister must state at the next sitting of Parliament why it was necessary to give the guarantee. In doing so, the Minister must provide an assessment of the risks associated with the guarantee.

[31] However, it is common ground that the opportunity to provide a guarantee by observing the strict controls in Section 60 is confined to guarantees in the narrow sense.

If the general prohibition created under Section 59 extends to guarantees in the broad sense contended for by the Crown there would appear to be an anomalous gap in relation to those "guarantees" which fell outside the more narrow type of guarantee sanctioned under Section 60. The curious result would be that although the Crown could effectively give guarantees in the narrow sense (supporting someone else's primary debt) by complying with appropriate controls, it would be incapable of incurring its own debts in the broader sense of "guarantee" contended for by the Crown whether or not it complied with the controls imposed by Section 60. We cannot believe that that is what Parliament intended. That in turn strongly suggests that "guarantee" was intended to have the consistent meaning of guarantee in the narrow sense in both Sections 59 and 60.

[32] The inference is that Parliament had a particular concern over the Government's committing itself to underwriting the commercial ventures of others, as distinct from incurring expenditure for the supply of goods or services to the Government itself. This supports the narrow meaning.

Other considerations

[33] Mr Frame pointed out that there were differences between the Act now under consideration and the Public Finance Acts in New Zealand from which most of the legislation was drawn. We have carefully considered those differences but in the end have been unable to derive any assistance from them. The fact is that the Cook Islands Parliament selected those parts of the New Zealand legislation that it considered to be appropriate. It did not adopt the definition of "contingent liability" used in the New Zealand legislation. It did not create a series of exceptions to the definition of "contingent liability" found in the Third Schedule to the New Zealand Act. It went further in the scope of the prohibition by adding "actual liability" to "contingent liability".

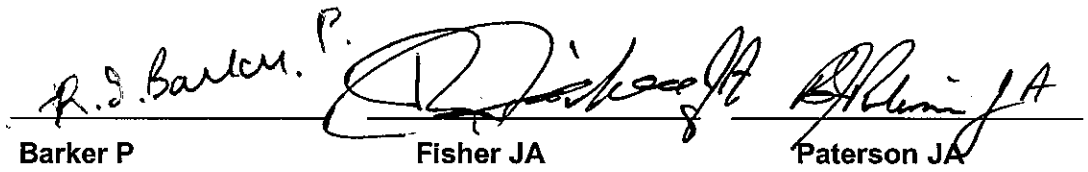
[34] All we can draw from those differences is that the Cook Islands Parliament deliberately adopted its own formula. It is that formula that we must give effect to. That is the consequence of Article 65(2) of the Cook Islands Constitution and Section 5(j) of the Acts Interpretation Act 1924 (NZ) (in force by virtue of Section 622 of the Cook Islands Act 1915). It is the Ministry of Finance and Economic Management Act 1995-96 of the Cook Islands that must be given its own fair, large and liberal interpretation.

[35] Mr Frame also argued that the narrow interpretation of "guarantee" would render otiose the words "that imposes a contingent liability on the Crown" because a contractual guarantee in the narrow sense always imposes a contingent liability on the guarantor. There might have been substance in this argument if Section 59 had been confined to the words "guarantee" and "contingent liability". In fact, however, both guarantees and indemnities are captured by Section 59. The alternatives of actual or contingent liability were entirely appropriate in relation to indemnities and thus were appropriate to cover all possibilities.

[36] Our conclusion is that in Section 59 "guarantee" is used in the narrow sense to capture only collateral contracts to answer for the liability of a primary debtor. It is common ground that clause 16(c) of the Settlement Agreement did not involve any guarantee in that sense. It follows that the Settlement Agreement was not rendered unlawful under s 59.

Result

[37] The appeal is dismissed with costs to the respondent in the sum of $6000 plus disbursements to be fixed by the Registrar including travel and accommodation for one counsel.



Barker P **Fisher JA** **Paterson JA**