

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 3156 of 2016

BETWEEN: ZHENG YUPENG
Claimant

AND: JIANG YING
First Defendant

AND: DONG XINGJIN
Second Defendant

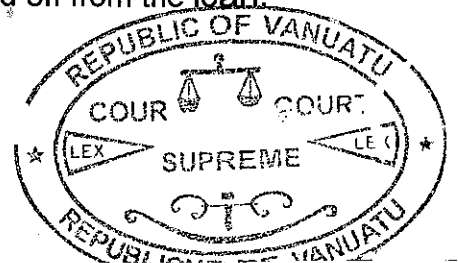
Conference: 2nd March 2017
Before: Justice Chetwynd
Counsel: Mr Wilson for Claimant
Mr Malcolm for 2nd Defendant
No appearance for 1st Defendant

Judgment

1. Much of the background to this case is agreed. The Claimant ("Mr Yupeng") lent money to the First Defendant ("Mr Ying"). The Second Defendant ("Mr Xingjin") was present when a document was signed by Mr Ying on 4th September 2014. Mr Xingjin also signed the document. A copy of the hand written document is at page 6 of the Bundle of documents filed on 27th January 2017. The amount of the loan was two hundred thousand Yuan and two million Vatu. The loan was to be repaid on or before 4th January 2015. All this can be seen from the document itself.

2. The document was, according to the Claim filed on 19th September, "written in Chinese language". There are two translations available. One was annexed to a sworn statement by Patrick Han filed on 19th September 2016 ("the Han translation") and one was provided by the Second Defendant. There are minor differences in the two translations and all the submissions and arguments were based on the Han translation.

3. This case has arisen because Mr Ying is said to have returned to China without repaying the entire loan. He has taken no part in these proceedings. Mr Yupeng maintains he has the right to recover what is owed from Mr Xingjin because he (Mr Xingjin) guaranteed the loan. This is disputed, Mr Xingjin says he merely witnessed Mr Ying's signature. That is the only real issue between the parties, did Mr Xingjin sign as guarantor or as witness? Having said that, there is another peripheral issue concerning what amounts, if any, have been paid off from the loan.



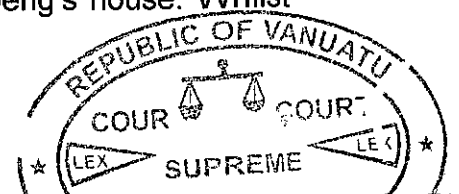
4. It is for the Claimant to prove his claim, to establish on the balance of probabilities that Mr Xingjin signed the document as guarantor. In order to prove his case Mr Yupeng filed a sworn statement and gave oral evidence. Evidence was also provided by Mr Patrick Han by way of sworn statements and oral testimony. In his defence Mr Xingjin also provided sworn statements and oral evidence. The oral evidence of Mr Yupeng and Mr Xingjin was ably translated in court by Ms Jane Wang and I am grateful for her assistance. Mr Han gave his evidence in English.

5. Looking at Mr Han's evidence, he was not at the meeting between Yupeng, Ying and Xingjin when the document was signed. He gives no evidence about any other meetings, discussions or documents relating to the loan. He says in his sworn statement filed on 30th January 2017, "*The agreement to borrow the money was written in Chinese and was made without legal advice as it was intended to safeguard the interest of Chinese men alone*". He also speaks in his sworn statement of "*we*" with the implication that he and Mr Yupeng entered into an agreement with the defendants. That was not established in the oral evidence of either Mr Yupeng or Mr Xingjin. Mr Han's evidence did not really assist in resolving any of the issues in this case. It was largely irrelevant hearsay.

6. There is scant information or evidence about who wrote the document at the centre of this case. The only evidence came from Mr Xingjin in cross examination. In answer to a question he said the Chinese characters for guarantee "*were not written by me*". It is also relevant that the document is referred to as a receipt rather than an agreement. It is accepted that in it Mr Ying does acknowledge the amount borrowed and does promise to repay the money on or before 4th January 2015 but it does have all the appearance of a receipt rather than a formal agreement for a loan.

7. Mr Yupeng's case is that because the word "guarantee" precedes Mr Xingjin's signature he must have signed as guarantor. I do not accept that submission. I prefer the submissions of Mr Malcolm that something more is needed to establish the relationship of guarantor and creditor. There must be evidence of a clear intention by the guarantor (in this case Mr Xingjin) that he will discharge the liabilities of the debtor (Mr Ying). There is no such indication in the document itself. It is clear that Mr Yupeng has read more into the document than it actually contains. For example he said in cross examination that the payments detailed in the hand written document were payments of interest and not payments of the principal even though there is no mention of interest or interest rates in the document.

8. It is this lack of detail in the document which creates problems for Mr Yupeng. Those problems could be solved if there was evidence of negotiations or discussion between the parties prior to the signing of the document. There is very little evidence of discussion about the suggested guarantee. Mr Yupeng says in his oral evidence that he told Xingjin that he would have to pay if Mr Ying defaulted. Mr Xingjin denies this. He says he was told by Mr Ying to go with him to Mr Yupeng's house. Whilst



there he was told to witness Mr Ying's signature. Nothing else was said to him. Even if Mr Yupeng's version is correct there is no evidence that Mr Xingjin agreed to guarantee the loan. A relationship of guarantor and creditor cannot be created by the unilateral decision of the creditor. There must be agreement by the guarantor as well and there is no evidence of that in this case. I bear in mind Mr Han's evidence that the document was in Chinese and was made without legal advice to safeguard the interests of the Chinese men alone which seems to be a contradiction in terms. How could Mr Xingjin's interests be safeguarded if he is suddenly told that he is a guarantor and he must accept that position without further discussion and without the benefit of legal advice ?

9. Mr Yupeng also points to the "admissions" made by Mr Xingjin in correspondence between lawyers. As I understand it the correspondence involved a *without prejudice* Calderbank letter written by Mr Xingjin's lawyers. That is not evidence that Mr Xingjin accepts he agreed to act as guarantor for Mr Ying to repay the loan.

10. Even if I am wrong in all that has been so far set out, Mr Yupeng cannot even establish what money is still owing to him. The document at page 6 records payments and the "Repayment Record" at page 8 of the bundle does not accord with what the document shows. A payment of VT120,000 appears to be missing. In addition Mr Yupeng agreed he had taken an "old car" as part payment but no allowance is made for that. Mr Xingjin gave evidence that stock from a shop had also been taken in part payment. That is not accounted for. Mr Yupeng has been unable to establish Mr Xingjin agreed to guarantee the loan and has been unable to establish what, if anything, is still owed in respect of the loan.

11. In all the circumstances the claim must fail as against the Second Defendant Mr Dong Xingjin. The Claimant shall pay the Second Defendant's costs. Given the Calderbank letter referred to earlier the costs shall be taxed on an indemnity basis if not agreed.

12. This judgment does not of course dispose of the claim against the First Defendant Jiang Ying.

DATED at Port Vila, this 7th day of March 2017

BY THE COURT


D. CHETWYND

Judge

