

CHU LING (JOHN) v BANK OF WESTERN SAMOA (No. 2)

Supreme Court Apia  
Maxwell J  
25 January, 5 February 1988

CONTRACT - Guarantee - identity of principal debtor unclear - account could not be considered a contract debt - whether account was in the name of a legal entity.

HELD: A number of matais from the constituency of villages entered into a guarantee guaranteeing the account at the Bank of Western Samoa of some four villages. It was not able to be established who opened the account or who was the entity that the Bank was looking to as its principal debtor. The Plaintiff took over the account and now seeks an Order that he is not liable for the debt of his constituency.

- (1) The contract documents did not make clear that the guarantors were to be the principal debtors.
- (2) There was no incorporated constituency for which the Plaintiff could assume liability of the debt. There was no legal entity.

T K Enari for Plaintiff  
R Drake for Defendant

The action which I have before me today boils down to the plaintiff, John Chu Ling, seeking an Order that he is not liable for the debt of his constituency to the Defendant. I have made up my mind very carefully about the facts. Self-interest motivated both parties upon the unholy alliance which they embarked on on the 2nd February 1983.

So far as the Defendant was concerned there was an outstanding debt which clearly the Bank through its officers thought might be statute barred. I do not at this stage make a final determination of that point but there is a memorandum in the notes made not very long before the Loans Manager came on to the scene which certainly raised that possibility. There seems to be little doubt in my mind that the Bank was in a dilemma over the problem of what remedies might have been open to it.

On the 19 December 1970 a number of matais from the constituency of villages entered into a guarantee guaranteeing the account at the Bank of Western Samoa of some four villages. Nobody has been able to satisfy me as to who opened the account or who was the entity that the Bank was looking [in] to as its principal debtor. I am left to draw the inference that the guarantors might be regarded as the principal debtors but I am not prepared to go that far.

The evidence is unclear because whatever I look at I see on the notes of the Bank, reference to the names of the villages. Indeed that account was ultimately closed and reference was made to the village, not as I see it as a legal entity, or any persons legally bound on its behalf. The notes which I have, seem only to start in December 1985, where reference is made to there being no reduction in the amount since May 1985.

Towards the end of 1979, the Bank made a trip[s] to Savaii to try and locate the guarantors but it seems that that trip was unsuccessful. Attempts to contact them were made on the radio and there continued to be no response. So as I see it, when Mr Chu Ling arrived on the scene he was as far as the Bank was concerned Heaven sent, because here was someone who was or appeared willing to take over the account.

I would not go into the minor details but I am quite sure that Mr Slaven saw Mr Chu Ling and made a lengthy memorandum on the 2nd February 1983. He was trying to tidy up a very unsatisfactory situation. So far so good. Let us look at this from Mr Chu Ling's point of view. I did not find Mr Chu Ling as a witness particularly satisfactory and I am satisfied that the notes that were recorded are a more accurate description of the transaction than the record or the transcript of Mr Chu Ling's evidence. Let me say also that I am satisfied that there were political motives in his approach to the Bank. I am satisfied that he agreed to take this debt on because he saw a political advantage in it and I would go so far as to say that it may well be that the Bank did not dissuade him in that view. Mr Chu Ling argued that he was virtually blackmailed into taking the account over, on being told that unless he did take this account over he would not get an overdraft.

I do not accept that and I prefer Mr Slaven's explanation of the arrangement and also his comments on Mr Chu Ling's credit record. I believe that the matters could be separated but certainly Mr Slaven was prepared, when the advance was made to some extent, to do Chu Ling a favour.

It was after this however that to my way of thinking the Bank started to go into a tailspin which borders on the unethical because underlined in the Bank's notes of a very full record by [a] Mr Slaven, there is this: "Please ensure this information

regarding the Member of Parliament taking over this account is not released to anyone that calls from the district". Then there is another note dated 6th December, it is stated on top, "Attention: Loans Department - Should any representative from this village call to ask questions on this account please refer to Charles Slaven before you release any information on the account". I have no doubt that Mr Chu Ling intended to call in and fetch from the Bank a letter as the elections approached and show it to the village or villages whose votes he hoped to get. That was his intention but something went wrong. It seems that there may have been candidates in the village who stood against him. Mr Chu Ling maintained that that has nothing to do with him. It was then [therefore] he claims he realised that he had not understood the transaction but he blamed Mr Slaven. I do not accept that for one moment. I have no doubt and as I found as a fact on balance that Mr Chu Ling was well aware of what he was doing in taking over the account and I do not for one moment accept that any representative of the Bank had influenced Mr Chu Ling or that the contract was unconscionable. Mr Chu Ling saw it as an easy way of attracting votes.

From there on the Banks involvement got murkier and murkier, because I am satisfied the Bank as a result of pressure from Mr Chu Ling proceeded on the basis so far as the village was concerned that the money was still owing. The letter written to the guarantors was perfectly unequivocal that what the Bank had been doing was writing to the guarantors making demand when they had been absolved from liability. Legally from the 2nd February 1983 to at least the end of 1984, and later, the guarantors should have been removed from the impression that the account with the Bank of Western Samoa was still outstanding and they were still liable. The contrary was the position and the account was actually closed on 4th February 1983. Now I am satisfied that it was Mr Chu Ling's influence on the Bank that brought about this situation but the Bank's acquiescence in it was in my view unethical. It did not achieve the standards one expects from a professional business involving bankers. The explanation the Bank got into this I am satisfied, was because it wanted to see the account paid off as quickly as possible. But the Bank had left its options open when it had difficulty with Chu Ling of trying again to deal separately with the guarantors. Now those are the facts as I find them and I turn now to the question of law.

The matter which concerns me since I started this matter is to who was the principal debtor? That has not been satisfactorily resolved and I am not prepared on the evidence to draw the inference that the guarantors were the principal debtors. On the evidence I have before me I draw the inference that the guarantors may well have guaranteed an account which in law was not in the name of a legal entity. I accept that this may be the practice but it seems to me that the Bank contract had neglected

to secure the nature of the party to whom monies were lent. In this case while it may have been the practice, apart from the guarantors, the Bank had very little else, because the contract documents do not make clear if the guarantors were to be the principal debtors. So was there a contract debt which Mr Chu Ling had taken over? On the evidence I am satisfied that there was not. There is a difference in law between a principal debtor and a guarantor. I accept the submissions of Mrs Drake that it was the fault of the Bank in not calling up the guarantors if he wanted to take over the account, but it seems to me that what really the Bank did was jump from the frying pan into the fire served by the political motives of Mr Chu Ling into thinking the account would be in his name and the funds would be collected by him. My ultimate finding is that Mr Chu Ling is not liable for the debt of his constituency. There was never an incorporated constituency for which he could assume liability of the debt. There was never a legal entity. I am not happy in saying that because Mr Chu Ling was the author of his own misfortune. The Bank in my view from 1984 onwards muddied the waters by long threatening letters to people who were no longer guarantors. It seems that the Bank continued to keep this subterfuge up and while I accept Mrs Drake's submissions that Mr Chu Ling rested on his rights, the same may be said of the Bank. I have no evidence that it is liable to get its monies from Mr Chu Ling. That is the Declaration I make. I have no evidence on the question of his liability to the Bank and that Order is dismissed. The question of damages on the evidence I have heard is laughable and Mr Chu Ling will not get one penny from me and each party is responsible for its own costs.