

**CP HOMES LIMITED -V- BEXTER ROBERT AND OTHERS**

**High Court of Solomon Islands  
(Kabui J.)**

**Civil Case No. 135 of 1996  
Hearing: 10th June 1998  
Judgement: 17th June 1998**

***Andrew Radclyffe for the Plaintiff  
Andrew Nori for the First Defendant***

**JUDGEMENT**

**KABUI J:** By a Writ of Summons filed on 3rd May 1996 together with a statement of claim, the Plaintiff claims damages against the First and the Second Defendants in the following sums of money for breach of contract -

- (a) \$150,000.00;
- (b) \$13,158.00;
- (c) \$659,734.79,

being moneys due to the Plaintiff under a Loan Agreement signed by the Plaintiff and the First and Second Defendants on 19th October, 1995. The sum of \$150,000 was the loan money. The sums of \$13,158.00 and \$659,734.79 respectively were costs against invoices also to be paid with the repayment of the loan. There is no repayment schedule within the terms of the Loan Agreement. No interest rate on the loan is stated also. The service of the Writ of Summons and the statement of claim was effected upon the First and Second Defendants on 17th May, 1996. There being no appearance to the Writ of Summons by both the First and Second Defendants, a judgement in default of appearance was entered against them by the High Court on 6th June, 1996. An attempt to set aside this default judgement and the Order of the High Court dated 22nd July, 1997 by the First Defendant also failed. The matter of liability cannot now be raised for

argument. Assessment of damages is now the only thing left to be decided by the Court.

### **The Facts.**

The facts are these. The Plaintiff is a company with a limited liability whose address is P.O. Box 251, Honiara. The First Defendant is the licence holder for a logging concession on Lot 7 of LR. 515 in Parcel No. 143-001-2 on the Island of Vagunu in the Western Province. The Second Defendant is said to be the contractor for the extraction of logs and marketing them for the benefit of all the parties to the Loan Agreement. Prior to the date of the Loan Agreement, the First and Second Defendants had entered into a contract on 24th July, 1994 whereby the Second Defendant was appointed the exclusive contractor for the logging operation in the said concession area. This contract was not signed by them until 24th July, 1995. The First and Second Defendants again signed another Contract on 1st February, 1996 the terms of which are similar to those in the earlier contract signed on 24th July, 1995. The purpose of the Loan Agreement was to enable the completion of harvest and marketing of the logs from the said concession area. It is the alleged breach of the terms of the Loan Agreement that has brought the parties thereto to the Court.

### **The Plaintiff's Case.**

Mr. Radclyffe argues that the Plaintiff's case is simple. It relies on the terms of the Loan Agreement as a valid and binding document upon the parties thereto. There is, he says, no doubt that one Bexter Robert signed the Loan Agreement on behalf of the First Defendant and one Mahlon Ali did so on behalf of the Second Defendant. They are therefore jointly and severally liable to pay the Plaintiff's damages as set out in the Plaintiff's statement of claim. Mr. Radclyffe says the First and Second Defendants are guarantors for the repayment of the loan of \$150,000. At least, he says, the First Defendant is liable to pay the sum of \$150,000 plus the sum of \$13,158.00 being a sum outstanding against the Plaintiff's invoices.

**The Apportionment of Liability.**

As has been said, liability is not disputed. Rather, the apportionment of liability between the First and Second Defendants is the issue to be decided together with how much of that liability each Defendant would bear at the end of the day. The respective position of the First and Second Defendants is not at all clear to say the least. This is made worse by the non-attendance of the Second Defendant in Court since the commencement of this action by the Plaintiff. I am sure there are relevant facts that are not before this Court within the knowledge of the Second Defendant. The judgement of default has now barred the opportunity of cross-examination and perhaps directions for further evidence by affidavits. Only the First Defendant has come to Court to explain its position on the question of the extent of its liability in terms of how much of the Plaintiff's claim in damages it is legally liable to meet.

**The Loan Agreement.**

The starting point in resolving this matter must be the terms of the Loan Agreement. Paragraph 3 in the Recital to the Loan Agreement says that the "borrower" guarantees the repayment of the loan on the terms and conditions prescribed under the Loan Agreement. Clause (1) of the Loan Agreement says the lender will loan to the "borrower" the sum of \$150,000. Clause (2) says the lender will pay the loan directly to the "borrower" at such times and in such amounts as the lender shall determine. Clause (4)(i), (ii) and (ii)(a) use the term "borrowers" in the plural. The inconsistency in the use of the word "borrower" in the singular in three places above and in plural in Clause 4 may well be the hallmarks of bad drafting or typing errors. Also, this inconsistency may well equally signify differences of intention by the parties to the Loan Agreement. Clause (4)(ii) clearly demands that the borrowers must have in place with their banks an Irrevocable Letter of Credit at the time of negotiating the sale of the logs. Clause (4)(ii)(a) then says the negotiating bank is to receive two copies of the Plaintiff's invoices to the First Defendant and the Second Defendant

respectively, detailing clearly the amounts representing this loan and including all amounts outstanding and invoiced prior to the Loan Agreement owing to the Plaintiff by the borrowers. The amounts outstanding under the invoices are to be endorsed by the borrowers as being correct for purposes of full payment. Clause (4)(ii)(b) requires that a Letter of Authority plus a copy of the Loan Agreement be in possession of the negotiating bank to be the authority for that bank to comply with the conditions under the Loan Agreement.

#### **Evidence of Compliance.**

By his affidavit filed on 2nd October, 1997, one Puleipu refers to a Letter of Credit having been established with the National Bank of Solomon Islands (para. 41 of affidavit). This is compliance with Clause (4)(ii) of the Loan Agreement. Clause (4)(ii)(a) has not been complied with by the First and Second Defendants. The reasons for non-compliance have not been given directly to the Court by one Bexter Robert and one Mahlon Ali who signed the Loan Agreement. However, some understanding can be gleaned from Puleipu's affidavit referred to above. One Puleipu obviously was not aware that one Bexter Robert had signed the Loan Agreement on behalf of the First Defendant (para. 33). He was only aware of the two contracts signed on 24th July 1995 and on 1st February, 1996 (para. 34). In accordance with the first contract, about 2,000 cubic metres of log were produced for export around April, 1995 (para. 35). The money for that first shipment went into the First Defendant's account No. 1015072093001 at the ANZ Bank. The signatories to that Account were one Bexter Robert for the First Defendant and one Mahlon Ali for the Second Defendant (para. 36). The second shipment was for a little over 2,000 cubic metres of log (para. 40). No funds were paid into the First Defendant's Account at the National Bank of Solomon Islands (para. 41). Apparently, the owners of the First Defendant were not happy with the way one Bexter Robert and one Mahlon Ali had handled the funds for the first shipment of logs and therefore removed one Mahlon Ali as one of the signatories to the ANZ Bank Account (para. 45). They also decided to transfer their Bank Account to the National Bank of

Solomon Islands in January, 1996 (para. 47). Apparently, one Bexter Robert had transferred the sum of \$329,646.77 which was the First Defendant's funds for the second shipment of logs to a term deposit account and the one Puleipu got this money back into their Solicitor's Trust Account (paras. 53 & 54). The First Defendant's liability to the Plaintiff in terms of moneys due to the Plaintiff against its invoices is in the sum of \$13,158.00. (para. 55). One Bexter Robert had signed the Loan Agreement without the authority of the owners of the First Defendant (para. 56). The Letter of Authority was signed on the understanding that the loan was to be repaid by the Second Defendant out of its operational costs and not out of the First Defendant's royalties and that the loan sum was \$150,000 (paragraphs 57 to 59 and 60). The First Defendant accepts liability for the sum of \$13,158.00 as its proper and legal liability (para. 59). Clause (4)(ii)(b) has not also been complied with for the reasons stated in paragraphs 57 to 59 and 60 above.

**The Two Contracts Between the First and Second Defendants Prior to the Loan Agreement.**

Clause 4 of the first contract in 1995 made it quite clear that the contractor was to be responsible for all operating cost including plant and machinery. Payment to the contractor under Clause 5 was in the sum of US\$80 per cubic metre on f.o.b. value. The second contract in 1996 repeated Clause 4 of the first contract with amendments. Payment to the contractor under Clause 7 was reduced to US\$75 per cubic metre on f.o.b. value. This clause was further amended on 18th March, 1996 to say that for logs classified as sawmill and low grade logs, the parties would share the f.o.b value equally. These were the commitments of the First and Second Defendants prior to the Loan Agreement.

**Separate Liabilities of the First and Second Defendants.**

Exhibit "B" to one William Dyer's affidavit filed on 7th May, 1996 shows that the total sum due to the Plaintiff from the Second Defendant for the years 1994, 1995 up to 30th April, 1996 was \$659,734.79. The loan principal appears as \$150,000 with \$19,548.63 interest. This summary of invoices and statements was duly endorsed by one Mahlon Ali as being correct for the purpose of payment. In the case of Exhibit "C" to that same affidavit, the sum due to the First Defendant was \$13,158.00 unendorsed as being correct for payment. This is fairly consistent with one Puleipu's story in his above affidavit. This is again consistent with paragraph 3 of one William Dyer's above affidavit. That paragraph states -

***"3. The Defendant(s) have failed to pay the sums due under the loan which are as follows:-***

- 1. \$150,000.00 loan***
- 2. \$509,734.79 in respect of invoices to the Second Defendant***
- 3. \$13,158.00 in respect of invoices to the First Defendant***

***Attached hereto marked B and C are the invoices referred to".***

Obviously, there were contractual obligations between the Plaintiff and the First and Second Defendants prior to the date of the Loan Agreement. It is therefore beyond doubt that the First Defendant will pay the Plaintiff the sum of \$13,158.00 as moneys to which it is liable to pay under Clause (4)(ii)(a) of the Loan Agreement. Likewise, the Second Defendant will pay the Plaintiff the sum of \$509,734.79 being moneys to which it is liable to pay under Clause (4)(ii)(a) of the Loan Agreement. I therefore order that the First Defendant pay to the Plaintiff the sum of \$13,158.00 and further order that the Second Defendant pay to the Plaintiff the sum of \$509,734.79.

**The \$150,000.00 Loan.**

In practice, the First Defendant being the resource owners are entitled to royalties. This is their reward for selling their rights to their forest resource. They do not normally meet the cost of extraction of the logs and the marketing of them. This is the responsibility of the licence holder which is normally a logging company that has machinery or is able to hire machinery and is able to secure working capital. Nowadays, a number of resource owners have applied for timber licences in order to harvest their own timber resources themselves. These licences are issued in the name of corporate bodies such as companies incorporated under the Companies Act (Cap.66). In such cases, the licences are bare licences in that the licence holders lack the capital and the operational and marketing expertise to carry out and complete the logging operations necessary to produce the expected benefits due to the resource owners. The practice has been for the licence holders to engage contractors to do the logging operations for the owners of the resource for reward. Again, the contractors are expected to finance their own operation at their own costs but with the view that royalties are received by the resource owners. If funds are to be borrowed, it is the responsibility of the contractors to do so bearing in mind the profit margins to be achieved. This, obviously was the arrangement between the First and Second Defendants in this case. No evidence has been tendered in Court about the Second Defendant other than its inability to pay its debts. Its management under the leadership of one Mahlon Ali was not obviously impressive. In order to complete the operation in the said concession area, it needed further funds and thus its wish to borrow from the Plaintiff the sum of \$150,000.00. Although by his affidavit one Puleipu denies any contractual relationship with the Plaintiff (para. 33) whatsoever, and alleges that one Bexter Robert had signed the Loan Agreement without the authority of their tribe (para. 56) the fact is that one Bexter Robert being the Managing Director of the First Defendant had made the First Defendant a joint party to the Loan Agreement. In my view, both the First and Second Defendants had agreed to enter into the Loan Agreement jointly and to

repay it jointly. There is no evidence to suggest equal responsibility for the repayment of the loan nor some other arrangement whereby the First or the Second Defendants would be responsible only for the repayment of a fraction of the loan. I therefore **order** that the First Defendant pay to the Plaintiff the sum of \$150,000.00 in addition to its other liability for \$13,158.00 above.

Costs of this action to be borne by the Second Defendant.

***F. O. KABUI***

**F. O. KABUI  
JUDGE.**