

BETWEEN: ZHENG YUPENG
Appellant

AND: JANG YING
First Respondent

AND: DON XINGJIN
Second Respondent

Coram: *Hon. Vincent Lunabek, Chief Justice
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan*

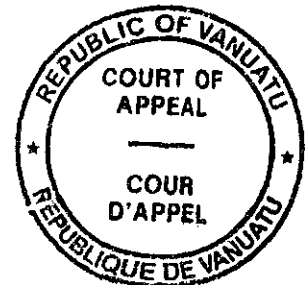
Counsel: *Dane Thornburgh for the Appellant
John Malcolm and Stephanie Mahuk for the Respondents*

Date of hearing: *11th July 2017*
Date of Judgment: *21st July 2017*

JUDGMENT

Introduction

1. This appeal is against the decision of the Supreme Court issued on 7th March 2017 when the primary Judge dismissed the appellant's claim against the second respondent and awarded costs on an indemnity basis against the appellant. The judgment does not dispose of the claim against the first respondent, Jiang Ying.
2. The appellant's notice of appeal sets out ten grounds of appeal. However, these were distilled into three grounds by the appellant's Counsel in his submissions. Those grounds were:
 - a) That the interpreter at the trial was not independent and that impacted on the fairness of the hearing;
 - b) That the transcript was not accurate, and



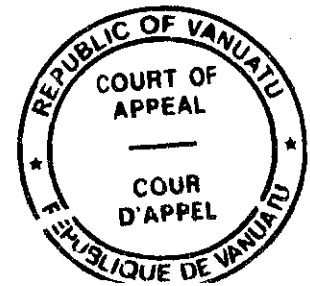
- c) That the trial judge did not attach sufficient weight to the Notice of Response filed by the second respondent and to subsequent correspondence which the appellant alleged established that the second respondent admitted liability.
3. A further ground contained in the Notice of Appeal challenging the costs order was abandoned by the appellant's counsel. In any event it was clearly misconceived. The costs order was properly made following the dismissal of the claim.

Facts

4. On 4th September 2014 the appellant (Zeng Yupeng) advanced Two Hundred Thousand Yuan and Two Million vatu to the first respondent (Jiang Ying). The appellant and the first respondent signed a document in respect of the money lent. The moneys were to be repaid on or before 4th January 2015. The document was written in mandarin Chinese. The second respondent (Don XingJin) was present when the document was signed.
5. The first respondent returned to China without repaying the entire loan. The appellant maintained he had a right to recover the moneys owed from the second respondent because he had acted as a guarantor for the loan. Mr Xingjin disputed this and maintained he merely witnessed Mr Ying's signature.
6. This became the only real issue before the primary Judge. The primary Judge found no evidence that Mr Xing had agreed to guarantee the loan and dismissed the claim. The appellant has therefore appealed to this Court seeking to have the dismissal set aside, and judgment entered in his favour for the balance of the loan.

Application to call fresh evidence

7. When the appeal was called Counsel for the appellant sought to adduce fresh evidence in the form of a sworn statement from Patrick Han. Mr Han deposed that he had been in Court during the trial. He made allegations about the conduct of the trial and about the accuracy of interpretation of the appellant's evidence. He alleged there was a misinterpretation of a critical answer in the appellant's evidence.
8. He alleged the appellant said: "*He showed he was able to read the words and the signs on the document*". This answer was directed to the Mandarin Chinese character on the alleged guarantee which the appellant contended meant "guarantee". The Judge's notes however records the answer as "*He showed that he (was) able to read the words and sign*".

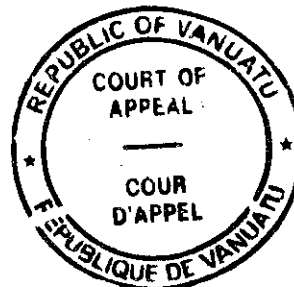


9. The Judge's notes are not inconsistent with the alleged answer given by the appellant. In any event the answer alleged by Mr Han, if correct, does not assist the appellant's case as the second respondent admitted from the outset that the Mandarin Chinese character alongside his signature means "guarantee".
10. The Court refused to receive Mr Han's sworn statement as fresh evidence as it could not assist with the resolution of the appeal, and in any event was not supported with a timely application to admit fresh evidence.
11. The first ground relates to the interpreter and the lack of her independence at trial. Mr Thornburgh submitted that the primary Judge had erred in not ensuring an independent and duly qualified interpreter be used to assist in the Mandarin Chinese language and the meaning of the word "*Guarantee*". Counsel relied on the case of SZRMQ .v. Minister of Immigration and Boarder Protection (2013) 219 FCR 212 as authority for submitting that the hearing was procedurally unfair.
12. In our view the case cited does not assist the appellant's case. The primary judge referred to the interpreter's assistance in paragraph 4 of the decision as follows-

" 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."

(underlining for emphasis).

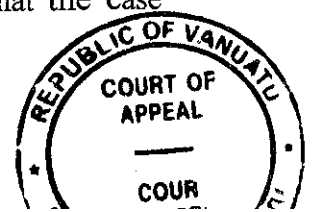
13. The appellant did not produce any evidence showing any objections to Ms Wang interpreting and her lack of independence at the hearing. Therefore the appeal cannot succeed on this ground.
14. The second ground of appeal relates to the accuracy of the translation of the document and in particular of the word "Guarantee" and whether the presence of that word on the document next to the second respondent's signature created a legally enforceable guarantee.
15. We have already pointed out that the second respondent did not dispute that the Mandarin Chinese character next to his signatures meant "*guarantee*". The outcome of the appellant's claim did not turn on the meaning of the Mandarin Chinese character. The claim turned on whether by signing the document where he did be agreed to guarantee the loan.



16. At the hearing Mr Xingjin's evidence was-
- a) He did not want to go to Mr Yupeng's house to sign the document but was told to do so by Mr Ying.
 - b) He did not know the document he was to sign was a guarantee for a loan between Mr Yupeng and Mr Ying.
 - c) He told the parties he was merely a witness to their signatures.
17. The primary Judge said this in relation to that evidence at paragraph 8 of his judgment-
"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 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 man 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."

(emphasis added)

18. We agree and endorse the findings of the primary Judge. The position taken by the primary Judge correctly reflect, the legal position of the law of guarantee established in Williams v. Bayley (1886) LR 1 HL 200, a case cited by Mr Malcolm.
19. The third ground of appeal also contends that the primary Judge was in error in not holding that the second respondent had admitted liability when the claim was served, and in later correspondence.
20. At the outset the second respondent indicated on the Response form that liability was admitted but not the quantum of the claim, and later in correspondence, some without prejudice, he offered to admit liability and consent to judgment for slightly less than the claim. This occurred in the course of negotiations to settle a relatively small claim to save litigation costs. the negotiation led to a counter offer from the appellant which the second respondent accepted. Then for reasons that the appellant's case does not explain, the appellant repudiated the agreed settlement and demanded that the case



proceed. The second respondent accepted the repudiation. It seems both parties treated the situation thereafter as one where all concessions and deals were off, and the case was to be decided on its merits. That is what happened and it is now too late for the appellant to turn back the clock.

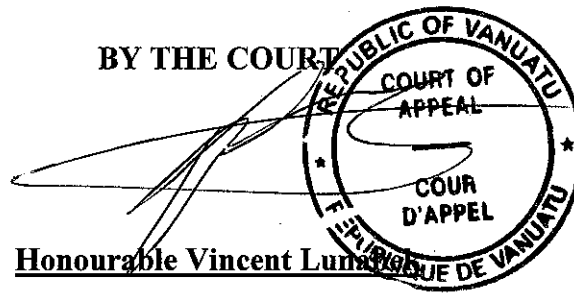
21. The appeal fails also on this ground.

The Result

22. This appeal is dismissed. The second respondent is entitled to his costs of the appeal on the standard basis to be agreed or taxed failing agreement.

DATED at Port Vila this 21st day of July 2017

BY THE COURT



Honourable Vincent Lunan

Chief Justice