IN THE HIGH COURT OF SOLOMON ISLANDS

CIVIL JURISDICTION

Civil Case Number 258 of 2019

BETWEEN: **BANK OF SOUTH PACIFIC FINANCIAL GROUP** - Claimant

AND: **STAR HORIZON LIMITED** - 1st Defendant

AND: **PAUL OANA** - 2nd Defendant

AND: **JOHN ARUINAO** – 3rd Defendant

Date of Hearing: 19th September 2022.
Date of Ruling: 30th September 2022.

Counsel; Mr Radclyffe for Claimant/Respondent.
Counsel; Mr Upwe for 3rd Defendant/Applicant.
No Appearance for 1st and 2nd Defendants.

KENIAPISIA; PJ:

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

1. First defendant company ("SHL") took a loan from the claimant bank ("the bank") on **24/11/2016**. The loan offer was contained in a letter from the bank dated **16/11/2016**, addressed to SHL. The letter of offer dated **16/11/2016,** contained all the major *terms* and *conditions* of the proposed loan. Based on normal lending practice, the intention of the offer letter was for it to become the *conclusive* and *legally binding contract* upon acceptance. In other words, the offer letter, upon acceptance, would become the binding contract, between the bank ("offeror") and SHL ("offeree"). Counsel Upwe ran some very strange submissions suggesting that the letter of offer dated **16/11/2016**, signed by the bank, SHL, Paul and John on **24/11/2016,** is not the loan agreement. The loan agreement is yet to be disclosed. That is a very weak argument probably suggesting lack of knowledge. Court can now settle for parties that the letter of offer dated **16/11/2016**, signed by the bank, SHL, Paul and John on **24/11/2016** constituted the legally binding and enforceable loan agreement.

2. The loan agreement was made between the bank and SHL as the 2 primary parties (*lender* and *borrower*). But that is not the end of the story. The other part of the story (loan agreement) is that Paul and John took upon themselves, the responsibility to *guarantee* the loan. The legal effect of *guaranteeing* a loan is, the person making the *guarantee* (*guarantor*) is *promising* or giving an *undertaking* that he/she will be responsible to pay

back the entire loan, if the borrower can't. A *guarantor* is often required, if the *lender* does not feel secure to lend money to a *borrower* alone. This is a banking practice that is prevalent in the lending business.

3. Here, by implication, the bank (*lender*) did not feel secure to lend money to SHL (*borrower*) alone. So, Paul and John put up their hands, to *guarantee* the loan. Paul and John therefore signed the loan agreement as *guarantors*. In the eyes of the law, Paul and John were legally bound by the loan agreement through the *promise* or *undertaking* they gave to secure SHL's loan from the bank. That means Paul and John *promised* to repay the loan given to SHL, in the event, where SHL can't afford. It is normal for the *borrower* and *guarantor* to know each other well for such a *promise* to be given voluntarily. Court can imply that Paul and John knew SHL very well or have some form of close relationship. That is why John and Paul volunteered to take the risk to *guarantee* SHL's loan. It is a risk because if SHL fail to pay, then John and Paul will be held responsible - *guarantors*.

4. The primary responsibility to pay the loan rests with SHL. However, if SHL can't afford, then as *guarantors*, Paul and John *promised* to pay back the entire loan. This is the very reason why Paul and John signed the loan agreement as *guarantors* and executed *charges* over their 2 respective houses as collateral for SHL's loan – PN 191-029-138 and PN 191-036-45.

5. Now that SHL cannot afford to repay the loan, the bank can call upon the *guarantors* to honour their *promise*, by selling the 2 houses/properties Paul and John *mortgaged* to secure the loan for SHL. That is exactly what is happening in this proceeding. The bank wants to sell Paul and John's houses to recover SHL's loans, because SHL defaulted.

6. To all of the aforementioned established or customary banking practices (resembling the facts of this case), there is no defence, prima facie or arguable or meritorious or whatever term one may wish to call it. So, the 5 possible defence areas or issues submitted on by Mr Upwe based on the draft defence, will hold no water. The 5 possible defence areas or issues holding no merit are: -

   (i) **Mr John Aruinao is not privy/party to the loan agreement**. Mr John Aruinao is privy to the loan agreement as a *guarantor*. Mr John by signing as *guarantor*, *promised* to pay the entire loan, if SHL can't afford.

   (ii) **The loan agreement is not disclosed**. Misconception, the loan agreement is contained in the letter of offer dated **16/11/2016**, which John signed as *guarantor* on **24/11/2016**. There is no other loan agreement, yet to be disclosed.

   (iii) **All the terms of the loan agreement are binding on the borrower (SHL) not on John Aruinao**. Another misconception, because being a *guarantor*, John is bound by the terms of the loan agreement in terms of his *promise* (*guarantor*) to pay the entire loan, if SHL should fail to pay.

(iv) **That Mr Noda misrepresented to John into servicing the loan, when it is SHL who is obliged to pay.** It was in the interest of both John and Paul to ensure the loan they *guaranteed* is serviced because if SHL does not pay the loan, the *lender* (the bank) will call upon the *guarantors* to fulfil their *promise*. Court do not find any misrepresentation on the part of Noda in trying to have John service the loan. In fact, it was the best option to help SHL, to avoid the *lender* calling upon John to sell his house pursuant to the *charge* John executed over his house, as *collateral for* SHL loan.

(v) **There was no *consideration* to John as the guarantor from the loan agreement. Hence the loan agreement does not legally bind John.** A further misconception. Like I alluded to above as *guarantor*, John *guarantee* SHL's loan by *promising* to pay the debt, if SHL can't afford. It was a *unilateral voluntary promise* John made on his own accord, based on his implied close relationship with SHL, for which he is not expected to receive any corresponding *consideration* from the bank. In actual fact and in law, the *consideration* took place on the part of the bank. The bank did not have confidence to lend money to SHL alone for some risk reasons. The bank only accepted to take the risk (*consideration*) because Paul and John acted as *guarantees*. Like I alluded to above, *guarantee* is often made between people who know each other well.

7. Court is satisfied the draft defence disclosed no prima facie defence, or no arguable defence or no meritorious defence. Hence there is no *issue* to warrant setting aside judgment and going to trial.

8. Meritorious defence is the only ground Court heard submissions on from Counsel. Court can accept there was reasonable delay due to sickness, in not filing defence on time. Court can accept there is no prejudice to claimant from setting aside default judgment because cost can remedy any prejudice. But Court is not satisfied there is any meritorious defence to warrant proceeding to trial, in view of the aforementioned discussions and conclusions.

9. **Accordingly, Court decline the application to set aside default judgment. Parties meet their own cost. Claimant may file fresh application to sell the properties charged to secure the loan by the guarantors.**

THE COURT

JUSTICE JOHN A KENIAPISIA
PUISNE JUDGE