IN THE SUPREME COURT OF BELIZE, A.D. 2004

CLAIM NO: 579 of 2004

	(COLIN LANGFORD	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(1. ANTHONY KUYLEN	**DEFENDANTS**
	(2. ANDRE KUYLEN	
	(3. SYLVIA JEAN KUYLEN and	
	(4. MARLON DUANE KUYLEN	
	(doing business as	
	(KUYLEN'S HARDWARE (a firm)	

Mr. Dean Barrow, SC, for the Claimant
Ms. A. Arthurs, for the first, third and fourth Defendants
Mr. A. Marshalleck, for the second Defendant

AWICH J.

10.4.2006 **JUDGMENT** ***Ex tempore***

1. *Notes:* *Money lent at the request of individual family members for use in a limited company in which they are some of the directors; lender knew the company was in financial difficulty, no resolution of the company authorizing the request. Whether the company is liable to pay the loan or the individuals who requested are personally liable. Admissibility of late witness statement, R 29.11 (1) and (2).*

2. This case raises one crucial issue of fact, namely, whether the sum of $500, 000.00 lent by the claimant, Mr. Colin Langford, on 18.7.2000, was lent to the four defendants, Anthony Kuylen, Andre Kuylen, Sylvia Kuylen and Marlon Kuylen, or to Kuylen Brothers Company Limited, a body corporate, whose shares the defendants own. In that issue of fact lies the sole question of law, as to whether it is the company that is liable to pay the sum lent or the defendants personally. The question raised is important because Kuylen Brothers Company

Limited has collapsed, and if the money was lent to it, the money would be lost to the claimant.

3. In the course of the trial, the claimant withdrew the claim against the third defendant. Accordingly, the order that I make in regard to the claim against her is: the claim against the third defendant stands withdrawn, the claimant will pay her costs of the proceedings, to be agreed or taxed.

The Facts:

4. The first defendant is the father of the second and the fourth defendants. The third defendant is the mother. At the time the money was lent, the claimant and his family, and the defendants and their family were close family friends; absolute confidence existed between them.

5. The evidence for the claimant and for the defendants are diametrically divergent on the crucial point of fact, however, it was common facts that the money was lent by the claimant, interest was chargeable at 10% per annum and the loan was made at request. It was in issue though, whether the request was made by or on behalf of the three defendants and their family members personally, or on behalf of the company.

6. The evidence by the claimant was that, over time, the first, second and fourth defendants requested him to lend to them $500, 000.00 because their family business needed money. They knew he had the money. He mulled over it and gave the loan. The bank's interest on deposit was 5% per annum at the time. The Kuylens were offering 10%. They asked for the money as a family, based on their friendship, not on behalf of Kuylen Brothers Company Ltd. The first, second and fourth defendants individually and also together, on diverse occasions, asked for the loan.

7. On the other hand, only the first defendant accepted that he made the request in person, but on behalf of the company. The second and fourth defendants denied ever making the request in person, whether for the company or for themselves personally or for the family. They however, accepted that they worked in the company and were aware and concerned about the financial situation of the company. The first and fourth defendants accepted that they discussed among themselves and agreed to request the loan, but on behalf of the company, from the claimant, and added that it was an idea from the second defendant. The second defendant denied even having discussed the loan or being aware that a request had been made for the loan.

8. The only independent witness, though called by the claimant, was Ms. Judith Molina, the branch manager of Scotia Bank Belize Limited at Stann Creek. She said that the claimant instructed her, " to debit his account and credit that of Kuylens Hardwares…… He was lending the money to the Kuylens who were very good friends of his". The debit and credit notes exhibits C(JM) 2 and C(JM) 3, showed that the money was credited to "Kuylens Hardware", but the bank account, exhibits D (AK) 13 A and 13 B, actually showed that the account debited was "Kuylen Brothers Company Limited", not Kuylens Hardware. When questioned, the witness said; that Kuylen Brothers Company Ltd. traded as Kuylens' Hardware, that the name of the account had been changed from Kuylens' Hardware to Kuylen Brothers Company Ltd., that the instruction was to credit Kuylens, she could not remember whether Kuylens' Hardware or Kuylen Brothers Company Ltd., that the claimant just said, "credit Kuylens account". The witness admitted that it was a long time, she may have forgotten some details. I attached much value to her testimony because of that frank admission.

Determination:

9. I have no hesitation in concluding from the evidence, that the second defendant told lies to this Court. He denied even the most common and harmless

information that the other members of the family had no difficulty admitting. I believe the first and fourth defendants that the second defendant was the key financial personnel of the company, and that it was he who initiated the loan discussion. I find that the second defendant, as well as the first and fourth defendants, asked for the loan in person.

10. My assessment of the evidence for the defendants as a whole is this. The first, second and fourth defendants discussed and agreed on borrowing the money from the claimant and to use it in the company. Each of them made direct request for the money at different times and sometimes together, to the claimant, as the claimant said, and that the first defendant pursued the request more than the others. I do not accept that his further action was a distinct new request for loan, it was about the $500, 000.00 that the claimant was mulling over, the same transaction. His action was merely to pursue and speed up the decision on the common request.

11. The defendants did not make it clear to the claimant that the request was made purely on behalf of the company, and not on behalf of each of the defendants personally or on behalf of the family. That the money was paid into the bank account of the company was indeed an item of proof that the money might have been lent to the company. But what Ms. Molina said was the instruction from the claimant rebutted that. I do not consider it sufficient to hold the company liable simply because the claimant knew of the existence of the company, or even that the money may be used in the company. These days, the so-called principles of small private limited companies do often raise money personally to salvage such companies. It must be proved that when the request was made the claimant had been told that the request was being made on behalf of the company or that the claimant clearly understood so.

12. The absence of any recording of the loan into the records of the company is another confirmation of the testimony of the claimant that the defendants

borrowed the money personally as friends, to use in their family business. The three defendants must be held jointly and severally responsible for the request they made in person.

13. I acknowledge the learned submission by learned counsel Ms. Arthurs, for the first, third and fourth defendants. I cannot, however, accept that this is a case where the principle of ostensible agency applies. The principle operates to stop a defendant who has made representation to the claimant from denying the agency. In the case, Ms. Arthurs cited, ***Freeman and Lockey (a firm) v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 AB 480***, the principle was used to stop the company, the defendant, from denying agency authority of someone who took action as a managing director although she had not been appointed. In this case, the claimant's case was not based on any ostensible agency of the defendants. On the contrary, he claimed that he dealt with the defendant not the company; although he was aware of the existence of the company. It is a question of whether the evidence as a whole, shows that the claimant intended and lent the money to the company or to the family, which would be to the individuals.

14. In my view, the discrepancy between the entry on the debit and credit notes on the one hand, which was that Kuylens Hardware be credited, and the entry crediting Kuylen Brothers Company Limited, on the other hand, confirms the truth in Ms. Molina's testimony that the claimant instructed her to credit "Kuylens account", not Kuylen Brothers Company Limited's account. That in turn confirms the claimant's statement that he lent the money to the family, not to the company. I accept the evidence for the claimant and reject that for the defendants where there is divergence.

15. One more fact must be taken into consideration, and on it alone, the three defendants must be held responsible for the loan. The defendants did not produce a resolution of the company, authorizing that the loan of $500,000.00 be

obtained from the claimant, and that the three were authorized to make the request. A company acts by resolution. In this case, Kuylen Brothers Company Limited, never so acted in regard to the loan. The defendants acted without the company's resolution, and are personally responsible for their actions. They are responsible for the loan.

16. Judgment is entered for the claimant against Mr. Anthony Kuylen, Mr. Andre Kuylen and Mr. Marlon Kuylen, personally, for $625,000.00 and interest at 10% per annum from 18.7.2004, on $500,000.00, until payment in full. The liability is effective jointly and severally.

17. Costs of the proceedings against the three defendants are to be paid by them to the claimant. The costs to be agreed or taxed.

Objection to Admitting Late Statement into Evidence:

18. At the trial, when the first defendant was called and sworn as a witness, Mr. Dean Barrow SC, learned counsel for the claimant, objected to the admission into evidence of the witness statement made by the first defendant. The ground for the objection was that his witness statement was delivered to the claimant's attorneys and filed 11 (eleven) days late. Mr. Barrow intended to raise similar objection to witness statement by the fourth defendant. Counsel cited, ***Rule 29.11 of the Supreme Court (Civil Procedure) Rules, 2005***, and judgment of Denys Barrow J. of the High Court of Grenada, in ***Civil Case No. 48 of 1999***, ***Kenton C. St. Bernard v Attorney General of Grenada***. Counsel submitted that the defendants should have at least applied under R 29.11(2) before the trial, for permission to have their late statements admitted, they did so only in respect of the statement by the third defendant. Counsel said he would not object to having the statement by the third defendant admitted. Later on counsel withdrew the entire claim against the third defendant anyway.

19. Learned Counsel Ms. A. Arthurs urged the Court to admit the statements. She submitted that even witness statements by the claimant and his witness were late by 1 day and 4 days respectively, so parties had assumed there would be no objection to the statements on both sides.

20. When the Court rose to consider a ruling, Mr. Barrow informed the Court that he would withdraw the objection because it had come to his information that the judgment by Denys Barrow J. had at least been distinguished by the Court of Appeal of the Eastern Caribbean in, ***Civil Appeal No. 22 of 2003, The Treasure Islands Company and Another v Audubon Holdings Limited and Others***.

21. The point of objection raised is new in our law of procedure, it having been introduced only on 4.5.2005. It may be useful for the Court to make known how it would have ruled, had the objection not been withdrawn. I give here my ruling for whatever it is worth.

22. First, it would be highly unfair and unjust to reject the late witness statements for the defendants when late witness statements for the claimant had already been admitted without any objection having been raised. That the statements for the defendants were several days later does not make the matter any less unjust.

23. Secondly, there has already been a persuasive judgment in court in England about late witness statement in the case of, ***Mealey Horgan Plc. v Horgan [1999], The Times, 6th July.*** The court granted extension of time, despite objection and submission by the claimant urging that the 14 days late statement be excluded from the proceeding. Buckley J., said that it would be unjust to exclude a party from adducing evidence at trial, save in very extreme circumstances, for examples, where there had been a deliberate flouting of court orders, or inexcusable delay such that the only way the court could admit the statement fairly would be by adjourning the trial. I am persuaded by that *dicta*.

24. Thirdly, no prejudice to the claimant's case, due to the delay, has been pointed out.

25. I would rule against the objection to exclude the two witness statements for the defendants.

26. Pronounced this Monday, the 10th day of April 2006.
At the Supreme Court.
Belize City.

Sam Lungole Awich
Judge
Supreme Court of Belize