

IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

AC 12 of 2016

NUKU'ALOFA REGISTRY

[CV 24 of 2015]

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**BETWEEN: VILISONI HEMALOTO**

- **Appellant**

**AND : MA'ASI TAUELANGI**

- **Respondent**

**Coram : Moore J  
Blanchard J  
Hansen J**

**Counsel: Mr. L. M. Niu SC for the Appellant  
Mr. S. Tu'utafaiva for the Respondent**

**Date of Hearing : 10 March 2017**

**Date of Judgment : 16 March 2017**

## JUDGMENT OF THE COURT

- [1] This is an appeal against a judgment of the Lord Chief Justice of 1 July 2016. The Chief Justice determined that a tractor then in the possession of the appellant, Vilisoni Hemoloto ("Vilisoni"), was the property of the respondent, Ma'asi Taelangi ("Ma'asi"), and ordered the return of the tractor to him. His Honour's conclusion was based on his view of the evidence that Vilisoni, while having paid for the tractor, had gifted it to Ma'asi unconditionally with the result that Ma'asi owned the tractor.
- [2] The following is an account of the principal facts as found by the Chief Justice that were not put in issue in the appeal. The tractor was bought in New Zealand in August 2013 where Vilisoni and his wife, Malia, were then residing as they had for approximately 30 years. They were members of a Catholic Church congregation in which Father 'Ofa Taelangi ("Ofa"), Ma'asi's brother, was serving as an assistant priest. Vilisoni and his wife were devoted parishioners and shared a close relationship with 'Ofa and he frequently visited their home and received their assistance. As the Chief Justice described it: "[a]t some stage, Vilisoni and Malia became aware that ['Ofa's] family in Tonga required financial assistance from him and expressed a general willingness to help ['Ofa] and his family".
- [3] On 24 July 2013, Ma'asi travelled from Tonga to New Zealand with the intention of obtaining a tractor and returning with it to Tonga. His evidence, which his Honour clearly appears to have accepted, was that he was obtaining a tractor to generate food

and an income for his family and he had discussed this with 'Ofa. His Honour found:

*[A]ware of Ma'asi having arrived in New Zealand, Vilisoni asked ['Ofa] whether Ma'asi needed anything. ['Ofa] told Vilisoni that his brother was a hard-worker and was able to grow crops to feed his family and sell in Tonga, but needed a tractor in order to do so.*

- [4] At some time before the purchase of the tractor, Vilisoni and Malia invited 'Ofa and Ma'asi to dinner. What was said at that dinner was of importance in the proceedings before the Chief Justice and is in this appeal. At some stage after the dinner Vilisoni suggested that he, 'Ofa and Ma'asi visit a business selling tractors to look for a suitable one. They did so on 30 August 2013. They saw one particular tractor, a Massey Ferguson, which was taken for a test drive. Its price was NZ\$15,000. This tractor was purchased, and while it was paid for by Vilisoni, the invoice and the receipt was made out in the name of 'Ofa. Further work was later done on the tractor before delivery, apparently paid for by 'Ofa. The tractor was then shipped to Tonga arriving 4 November 2013. Vilisoni relocated to Tonga in early 2015.
- [5] The Chief Justice recounted Vilisoni's evidence that before relocating he visited Tonga on at least four occasions, once in December 2013 and three times in 2014. Vilisoni said that on each occasion he visited Ma'asi and observed that the tractor was not being used to cultivate any land or grow crops and when asked about this, Ma'asi said he did not have the necessary ploughing equipment to use the tractor to cultivate

land. While the Chief Justice did not make express findings concerning this evidence, the manner of its recounting in his Honour's reasons indicates he accepted it. This evidence is consistent with other evidence that the Chief Justice actually relied on, namely that had Vilisoni seen the tractor being used to grow food, he would not have taken possession of the tractor as he did in February 2015, registering it in his name and not returning it to Ma'asi notwithstanding repeated requests to do so.

- [6] It was against this general background that Ma'asi commenced proceedings in the Supreme Court against Vilisoni seeking the return of the tractor and consequential relief as well as damages and interest.
- [7] The central legal issue in the proceedings was whether the tractor had been an unconditional gift from Vilisoni to Ma'asi. A related factual issue with potential legal consequences was whether Vilisoni had paid for the tractor and allowed Ma'asi to take possession of it on the basis that Ma'asi would grow crops, including for his family, and send containers of crops to New Zealand that Vilisoni could sell to recoup the cost of the tractor. A subsidiary factual issue was what was discussed at the dinner referred to in paragraph 4 above and whether it included Ma'asi sending containers of crops to Vilisoni.
- [8] In the course of his reasons the Chief Justice addressed, at some length, the credibility of the witnesses, namely Ma'asi, 'Ofa, Malia and Vilisoni. His Honour was critical of some of the evidence of Ma'asi but nonetheless indicated that, on the

whole, he found him to be a guarded but not dishonest witness. One of the Chief Justice's criticisms was that on several occasions Ma'asi stated that his intention had been to start using the tractor (before it was taken by Vilisoni) but that he provided no evidence of any steps he had taken to acquire the equipment he claimed was necessary to operate the tractor. This, in context, was plainly a reference to the use of the tractor to cultivate land for the growing of crops. Similarly he said that he did not find 'Ofa dishonest though he had been an uncooperative witness. As to Malia, the Chief Justice said he had no doubt she was an honest witness though could say little that was relevant to the proceedings apart from the nature of her relationship with 'Ofa. In relation to Vilisoni, his Honour said that he was not a good witness. In particular, in his evidence he was unclear and confused about, amongst other things, what was exactly agreed about the sending of crops. The Chief Justice's ultimate conclusion in relation to Vilisoni was that where there was a conflict between his evidence and the evidence of Ma'asi and 'Ofa, he would prefer the evidence of Ma'asi and 'Ofa.

- [9] No submission was made at the hearing of the appeal challenging these credibility findings. Indeed the transcript of the proceedings in the Supreme Court did not form part of the appeal papers and is not before the Court of Appeal. In the absence of the transcript it would, at the very least in practical terms, be impossible to impugn or even review those credibility findings. In any event appellate courts have long recognised and accepted the distinct and considerable advantage a trial judge has, having seen and heard the witnesses, in assessing

the credibility of witnesses: see, for example, the observations of the Court of Appeal in *Pacific Royale v Vakalahi* [2007] Tonga L R 46 at [19] and *Wang v Fund Management* [2008] Tonga L R 204 at [5].

- [10] In his reasons, the Chief Justice addressed what was said at the dinner at two points (paragraphs [10] and [24] - [25]). On the first occasion his Honour recounted the various versions of the events of that evening given by the witnesses. Vilisoni said he, 'Ofa and Ma'asi discussed "the arrangement in greater detail" and that he would purchase a tractor for Ma'asi in return for the shipment of containers of crops back to him in New Zealand in late 2014. On the other hand, Ma'asi and 'Ofa "resolutely den[ie]d" that there was any discussion or agreement regarding containers of crops". In the later discussion of the dinner at [24] - [25], the Chief Justice did not expressly accept the evidence of Ma'asi and 'Ofa denying any discussion about containers though his Honour noted their denial. Nonetheless having regard to the credibility findings referred to earlier, he must have accepted that the provision of containers of crops was not discussed that evening. However his Honour went on to say:

*"..... even if [there had been discussions to the effect that the purchase of the tractor was on the basis that Vilisoni would receive crops that had been grown using the tractor] .... I do not believe that in the circumstances anyone, including Vilisoni, would have taken those discussions as imposing a legal obligation on Ma'asi."*

This reference to "legal obligation" involves, in our respectful view, an erroneous approach that is discussed shortly.

[11] Of some importance are further comments of the Chief Justice in paragraph [25] of his reasons. He indicated that Malia's evidence did not assist because she admittedly did not hear what was discussed except she said there were references to tax allotments. His Honour then said he had no doubt she was correct as there clearly must have been discussions between Vilisoni and the other two men about how Ma'asi would use the tractor and how it would benefit his family. This was plainly a reference to the purpose for which a tractor was being sought in New Zealand by Ma'asi, namely to grow crops and generate food and income for his family in Tonga. There was a finding that this quite specific use of the tractor was discussed.

[12] The Chief Justice had said at the conclusion of the preceding paragraph in his reasons (paragraph [24]) that Vilisoni's relationship with 'Ofa was close and his intention in offering to buy the tractor was entirely unconditional. It is difficult to reconcile this conclusion with the undoubted discussion that occurred at the dinner (discussed in the preceding paragraph of this judgment) that the tractor was being bought for the purpose of enabling Ma'asi to generate food and income for his family. That is to say, at the very least, the tractor, even if a gift, was being purchased for this identified and specific purpose and the gift was made on that basis.

[13] Indeed the Chief Justice immediately thereafter (in paragraph [26]) relied on evidence of Vilisoni to dispel a suggestion that

the condition was more widely cast and involved not only using the tractor to grow crops but also the dispatch of containers of produce arising from the growing of crops to New Zealand. That evidence was that if he, Villisoni, had not received the containers of food but had seen that the tractor was being used as he had imagined, he would not have taken the action he did (of taking possession of the tractor in Tonga in February 2015 and registering it in his name). At the very least, this evidence, accepted by the Chief Justice, is supportive of a conclusion that any gift was made on a clear understanding that the tractor would be used to grow crops to provide food for Ma'asi's family and generate income and thereby relieve 'Ofa from a familial obligation to provide support to Ma'asi and his family.

- [14] This appeal is a rehearing: see Order 8 Rule 1 of the Rules of the Court of Appeal Rules and *Fonua v Tonga Communications Corporation Ltd* [2006] Tonga L R 278 at [20] and *Pacific Royale v Vakalahi* [2007] Tonga L R 46 at [19]. The role of an appeal court in such circumstances was recently discussed in a decision of a Full Court of the Federal Court of Australia in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181:

*Appeals to this Court are by way of a rehearing (Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; (2001) 117 FCR 424 at [20]). An appeal by way of rehearing requires this Court to decide the case for itself as to both facts and law and give effect to its own judgment (Warren v Coombes (1979) 142 CLR 531 at 552). However, this does not remove the need to find error on appeal before intervening (Branir at 435 [21]). In practice, the application of these principles may involve accepting the findings of*



*the trial judge, especially factual findings, including as to the reliability and credit of witnesses and the weight that should be given to competing evidence, unless shown to be wrong (Cabal v United Mexican States [2001] FCA 427; (2001) 108 FCR 311 at [223]-[224], quoted with approval in Branir at [23]).*

[15] In the present case, as referred to in paragraph 10 above, the Chief Justice appears to have proceeded on the basis that any condition associated with the gift of the tractor must have, in terms, created a legal obligation on the recipient. This is erroneous. A gift can be conditional notwithstanding that the condition itself might not, independently, create a legal obligation (in this case a contractual legal obligation to provide containers of crops) beyond any obligation which has conditioned the gift. It is sufficient for there to be a condition capable of satisfaction expressed with sufficient certainty and not illegal: see Law of Personal Property in New Zealand: Garrow & Fenton 7<sup>th</sup> ed, 2010, Volume 1, p 321. If the condition is a condition subsequent, as we believe it was in the present case, then a failure to satisfy the condition subsequent divests the gifted property from the donee or determines a gift otherwise vested: *ibid* at 321.

[16] It may be accepted that the focus in the trial and in this appeal has been on the question of whether the condition involved the dispatch of containers to Vilisoni in New Zealand containing crops. But, properly analysed, that condition necessarily involves, on the facts of this case, one or both of two possible elements. The first element was that the tractor was to be used to grow crops (to feed and generate income for Ma'asi's family)

and the second element was that at least some of those crops would be sent to Vilisoni in New Zealand. This is evident in Vilisoni's counterclaim (which, amongst other things, seeks a declaration that he is the owner of the tractor) in which he pleads:

*That, the agreement about the tractor was the plaintiff would take it to Tonga on his own expenses use same to plough land that he could not develop and his family and use the tractor to do work for other people, ship to the defendant two containers of food crops to sell a New Zealand so that he can be refunded his monies that he expended.*

- [17] The first element is more clearly illustrated by paragraph 6 of the defence which is in response to paragraph 6 of the statement of claim that pleads that Vilisoni and 'Ofa "were [like] members of one family up to the arrival of [Ma'asi] in New Zealand in July 2013". Paragraph 6 of the defence reads:

*That, he admits the allegations contained in paragraph 6 of the statement of claim. Further he says the defendant and his wife were like parents to the Priest 'Ofa Taueangi they kept and look after him as if he was their own son and helped him in all his needs and that of his family and that was **the main reason why the defendant purchased a tractor** because he wanted to let his family use it to find a living and not to burden the Priest with all the demands and requests instead concentrate on his religious role.  
(Emphasis added)*

- [18] In his brief of evidence, Vilisoni said that he confirmed all the allegations made in his statement of defence and counterclaim. Elsewhere in the statement of defence, Vilisoni refers to the

tractor not being used for farming purposes (paragraphs [3] and [10]) quite independently of any contention that no containers of crops were sent to him.

[19] We are satisfied that the circumstances in which Vilisoni paid for the tractor and allowed Ma'asi to take possession constituted a gift of the tractor subject to a condition subsequent that the tractor be used by Ma'asi to grow crops for his family and generate income for his family (the first element referred to in [16] above). This condition was not satisfied. Whether, additionally, the condition included, as Vilisoni may have believed (even if not discussed at the dinner) that Ma'asi would send him containers of crops ultimately becomes irrelevant to the status of the tractor. In the result, the ownership in the tractor ultimately vested in Vilisoni and he was entitled to do what he did, namely take possession of the tractor and register it in his name.

[20] It is unnecessary to deal with another issue raised in the appeal. That is whether the Chief Justice should have addressed and answered the question of whether the gift was unconscionable. After a careful and helpful discussion of the authorities concerning unconscionable conduct, the Chief Justice decided it was inappropriate to treat that legal issue as having been raised and requiring determination. The Chief Justice's reasons for declining to determine that question were correct.

[21] The Court of Appeal orders:

1. The appeal should be allowed and the orders of the Chief Justice set aside.
2. In lieu the respondent's application in the Supreme Court should be dismissed.
3. The Court declares that the appellant is the lawful owner of tractor registration G804.
4. The appellant's claim for damages and interest is dismissed.
5. The respondent pay the appellant the costs in the Supreme Court proceedings and the costs in this appeal.



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**Moore J**

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**Blanchard J**

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**Hansen J**