IN THE SUPREME COURT OF TONGA **AM 12 of 2012**

APPEALLANT JURISDICTION

NUKU'ALOFA REGISTRY

MELEANE TOLOKE

-v-

SIONE TU'IMANA

BEFORE THE HON. JUSTICE CATO

Mrs. Vaihu for the appellant
Mr. Pouono for the respondent

J U D G M E N T

This was an appeal from Acting Chief Magistrate Salesi Mafi. He had given judgment for the respondent in the sum of $8000.00 by way of damages for a breach of contract, and costs to the respondent's counsel as $500.00.

The facts

The appellant and the respondent reside at Veitongo. The respondent is a draughtsman at the Ministry of Lands and Survey and the appellant operates a car sales business.

On or about the 23rd September 2009, the appellant contacted the respondent about some land issues, and asked him to expedite the process. She offered to assist him with a vehicle if he could.

He subsequently was able to assist her and the appellant told him to come and view some vehicles. He and his engineer went to the car yard and chose a vehicle. The appellant was present and she proposed

according to the respondent a monthly basis of payment of $400.00 with a deposit of $4000.00. He essentially told her he could not afford to repay at that rate and asked if she would accept $200.00 per month. After that, he signed an agreement to this effect with a clerk in the office. Later, he said, having told the clerk he could only pay $200.00 per month that he had signed an agreement not appreciating that there was a requirement that repayments would be $1100 per month. He said he would never have purchased the van had he known this. The cost of the vehicle was $16,000.

He continued to pay $200.00 a month between the 23rd September 2009 and the 25th August 2010. He then fell in arrears and the appellant repossessed the vehicle. After he paid $2000.000 she released the vehicle. That was on or about the 15th September, 2010. He again fell in arrears and he paid a further $1500.00 to avoid a repossession and sale. Further payments were made to the 26th April 2011. In total, he had paid $6500.00 by way of instalments. These figures were set out in exhibit 2 being a schedule of payments. On occasions, in the later period he paid $300.00 a week.

In May 2011, the vehicle was repossessed and sold. The evidence does not reveal the price paid for the vehicle. With the deposit and instalments, the respondent has paid $10,500.00 towards the vehicle before it was repossessed and sold. The respondent appeared to be up to date with the $200 per month instalment obligation at the date of the final repossession and subsequent sale.

A further witness called by the respondent confirmed that the amount agreed to by the appellant at the meeting prior to the agreement being signed had been $200.00 a month.

There was little or no cross-examination recorded in the transcript of the witness contesting this evidence. It is fundamental that where issues of fact are in dispute that counsel challenge a witness so that the witness

may respond. If counsel does not then the evidence of the witness may be accepted as reliable. This is known as the rule in Brown v Dunn (1894) 6 R 67 (HL).

According to the evidence of the appellant's clerk who later signed the written agreement, ordinarily half deposit was required but in this case the respondent paid only $4000.00. He further said there had been no such meeting outside as the respondent and his witness asserted. He confirmed the vehicle had been repossessed and sold although there was no indication of the price obtained.

The appellant in her evidence denied there was any preliminary meeting. This appeared to be at odds with her assertion that the respondent had asked to pay $400.00 per month and then $200 a month for three months and then he would apply for a loan to pay it off. She said there was no such arrangement that the vehicle would be paid off at $400 per month, and nor was there any agreement to pay a lesser sum.

The Magistrate in his ruling found that there had been an agreement to pay $200.00 per month, as the respondent claimed. On the evidence he was entitle to that finding. I note that for a lengthy period the respondent did pay at the rate of $200.00 a month which gives support to the respondent's assertion there was such an agreement.

There was little or no cross-examination of the respondent's witness confirming $200.00 was agreed upon. The Magistrate was in my view entitled to prefer the evidence of the Respondent and hold that there was an agreement that the respondent and hold that there was an agreement that he pay off the balance at $200.00 per month. It seems likely that after the respondent had fallen into arrears on a couple of occasions the appellant tired of the arrangement, repossessed and sold the car and relied on the written agreement and the higher instalment obligation.

Reasons

A consequence of the finding of the Magistrate that there was agreement that the respondent pay instalments at the rate of $200.00 per month meant that the respondent in my view was able to rely on this assurance and able to resist the contention that the written agreement applied with a repayment rate $1100 a month or any other arrangement. Mrs. Vaihu for the appellant in both Courts relied on the repayment term in the written agreement in defence of her client's actions.

Mr. Pouono had cited two authorities before the Magistrare. J Evans and Sons (Portsmouth) Ltd and Andria Merzario Ltd [1976] 2 All ER 930 a decision of the English Court of Appeal and Wolfgramme v Robbertson [2006] Tonga LR 350. I refer to the words of Lord Denning MR in the Evans case, at pg 933 when having referred to the concept of a collateral contract he observed;

> "*When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract and he does act on it by entering into a contract we hold that is binding*."

Indeed, in such circumstances, it would amount to unconscionable behaviour or sharp practice to rely on the written words of the contract and disavow the earlier promise or representation. An analogous situation occurs in other areas of obligation. Thus, in cases where one party leads another to do work on the former's behalf and induces a belief there is a contract, when to the knowledge of the plaintiff there is not, the former will not be permitted to deny the contractual arrangement. Walton Stores (interstate) Ltd v Maher (1987-88) 164 CLR 387. Estoppel has also been applied in a similar way in England in Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd [1982] QB 133 where a party was able to insist on an option being part of the lease arrangement where there was a mutual understanding that the option was valid as represented to be the case by the landlord when it was not,

and this had induced the lessee to enter into the lease. The essence of all these cases is that an assurance or representation that induces a party to enter a contract or act as though there were a contract will be binding.

As I have said, it seems that the appellant had tired of the drip feed basis or repayment and chose highhandedly in my view to enforce the written terms of the agreement. I agree with the Magistrate that in repossessing the vehicle and in selling it she was in breach of the contract. The Magistrate correctly consider that the appellant was entitled to damages for breach of contract and again correctly assessed these as reliance loss or wasted expenditure being the value of the deposit and instalments totalling $10,500.00. For reliance damages, where loss of profit cannot be assessed, see Australia v Amman Aviation Pty Ltd (1991) 174 CLR 64. His assessment that this amount should be reduced by the sum of $2000.00 for use and enjoyment of the vehicle is in my view an appropriate deduction and Mr Pouono has not suggested otherwise. However, the Magistrate awarded the respondent only $8000.00. In my view, the correct figure allowing for a deduction of the sum was $2000.00 was $8500.00 and I vary his judgment to that effect.

At the hearing, I expressed the view that costs should lie where they fell in the light of the sums involved but having considered all the evidence, and the submissions of counsel, I consider that the respondent is entitled to costs on this appeal and I award a further sum $500.00 also as counsel's costs for preparation of this appeal and appearances. The judgment of this Court is;

1. The appellant is to pay the respondent the sum of $8700.00;

2. The appellant is to pay costs in the sum of $1000.00 to the respondent for the costs in this Court and the lower court, of counsel.

The Appeal is otherwise dismissed.

DATED: 21 AUGUST 2012 **J U D G E**