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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 48 of 2020

BETWEEN:

PAEA HAUSIA

Plaintiff

-and-

TUPETAIKI 'OTUKOLO

Defendant

Trial on liability

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs F. Vaihu for the Plaintiff
Ms A. Kafoa for the Defendant
Trial: 25 August 2021, 26 April 2022, 17 and 22 June 2022
Submissions: 13 and 29 July 2022
Judgment: 24 August 2022

Claim

1. In this proceeding, the Plaintiff seeks an order that the Defendant return certain chattels ("**the disputed items**") to the Plaintiff which he contends are his property; alternatively, damages in the sum of \$111,300 being the value of the disputed items.
2. The Defendant opposes the claim principally on the basis that he says that the Plaintiff gave the disputed items to him and that they are therefore his property.

Course of the pleadings and the proceeding

3. The proceeding has had a chequered and protracted history. For reasons which will become apparent later in this judgment, a brief excursion through the history of the proceeding will prove relevant when considering the central issue.
4. The Writ and original Statement of Claim were filed on 3 November 2020, together with an application essentially for an injunction requiring the Defendant to deliver the then disputed items to the Neiafu police station in Vava'u for safekeeping pending the hearing and determination of the proceeding. The Defendant initially opposed the application and contended that the goods were

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[Signature]

safer being kept at his house and that certain of them were being used by his children.

5. That application was eventually resolved by the Defendant's written undertaking dated 3 May 2021 of safekeeping of the speedboat, small boat, one 150 hp marine outboard motor and four ATV quad bikes then being kept at his sister-in-law's premises at Pangaimotu in Vava'u. In his undertaking, the Defendant added that of the four quad bikes, two were being used by his children and the other two had been damaged since they arrived in Tonga. In relation to the three 14 hp marine outboard motors claimed, the Defendant stated that one of them was locked inside the container at the Plaintiff's plantation and that he had no knowledge of the other two.
6. On 4 December 2020, the Defendant filed his original Statement of Defence. Relevantly, he denied the Plaintiff's allegation that, in November 2018, he employed the Defendant to "look after" the Plaintiff's kava and vanilla plantations in Pangaimotu and had paid the Defendant wages of \$500 per week until his services were "discontinued" in September 2020. The Defendant's pleaded version of the nature of the parties' relationship was that on or about October 2018, he entered into an oral agreement "to partner" with the Plaintiff in planting the kava and vanilla. No further terms of that alleged partnership (or joint venture) agreement were provided. The Defendant also pleaded that all the disputed items were given to him and his family by the Plaintiff "for their use and enjoyment".¹
7. The Defendant also initially counterclaimed against the Plaintiff for unpaid wages between September 2018 and August 2020 at the rate of \$1,000 per week which he pleaded was what he and his family should have received during that period (making a total of \$96,000), plus the cost of vanilla seedlings and fig plants said to have been provided by the Defendant for the plantation (\$35,000 and \$39,000 respectively) and \$40,000 in damages for the loss of crops planted by the Defendant at the plantation pursuant to "an understanding" between him and the Plaintiff by which those crops were to belong to the Defendant but which he had not been able to harvest before his services were terminated. The total of those

¹ Paragraphs 6 and 14.

amounts was \$183,400 although the prayer for relief inexplicably specified the counterclaim for damages in the sum of \$610,000.

8. On 16 April 2021, the Defendant filed an application for security for costs. In his supporting affidavit, he deposed, relevantly, that the then claimed disputed items had been given to him and his family by the Plaintiff for their "hard work and effort" at the farm. On 11 May 2021, that application was dismissed.
9. On 28 April 2021, in what was effectively his Reply and Defence to Counterclaim, the Plaintiff denied any partnership agreement with the Defendant and reiterated that the relationship was one of employer and employee with the Defendant occupying a "position of managing and looking after the project". The Plaintiff further pleaded that he alone had acquired the land for the plantation project and had provided all the financing for it, including wages for 8 to 13 labourers at \$300 per week, the Defendant's wages of \$500 per week and an additional \$500 per week to the Defendant for payment of expenses such as fuel and maintenance.
10. The Plaintiff also pleaded that he had given other items to the Defendant "for his services out of sheer appreciation on top of his wages", namely, assistance for the defendant's son to travel to China, two crates of goods for the defendant's retail shop and food for his family, an Xbox gaming console for the defendant's children, clothes and perfumes, assistance for a grandchild's birthday party, cash for the Defendant when he left the USA, furniture for the Defendant's dwelling house, a laptop computer for the Defendant's daughter, bicycles for the Defendant's children, and root crops planted on the Plaintiff's land and tended to by the Plaintiff's paid labourers and which were left for the Defendant to collect ("**the other gifts**"). The Plaintiff also referred to having provided a van, for which he paid \$23,000 in 2018, for use at the plantation. He pleaded that the Defendant had control of the vehicle and that he refused to return it when their dispute arose. After an unsuccessful attempt to change the registration and ownership details, the Defendant returned the van to the Plaintiff. The Plaintiff confirmed that the disputed items "were never given as gifts" to the Defendant. He also denied the Defendant's counterclaim in full.
11. On 20 May 2021, the Plaintiff amended his Statement of Claim to include additional items to those claimed so that the total list of the disputed items was

as follows: speedboat, small boat, one 150 hp marine outboard motor (150 hp), three marine outboard motors (14 hp), four ATV quad bikes, pipes, climbing shoes, a jack, timber, a pressure washer, eight new fishing nets, lighteners and ropes for sinkers, a compactor and two trailers for the quad bikes. The pleading further alleged that:

- 11.1 the quad bikes were to assist the work at the farm and the boats and outboard motors were for fishing including for the workers' meals;
 - 11.2 by letter from his lawyer on 9 September 2020, he gave notice to the Defendant of the termination of his employment and demanded the return of the disputed items;
 - 11.3 the Defendant returned the truck or van and some of the tools and equipment but refused to return the disputed items;
 - 11.4 a further demand for the return of those items was made on 14 September 2020;
 - 11.5 on 16 September 2020, the Defendant's then lawyer responded that the disputed items had been 'gifted' by the Plaintiff to the Defendant;
 - 11.6 the Plaintiff denied any gifting of the disputed items and pleaded that he had spent substantial amounts on them and that they were vital to the work on the farm and his workers.
12. By his Amended Statement of Defence filed 28 May 2021, the Defendant asserted that all of the disputed items had been gifted it to him although he disputed the quality and values ascribed by the Plaintiff to some of them. Further, in relation to certain of the disputed items, the Defendant alleged that:
- 12.1 he left the pipes inside a container owned by the Plaintiff;
 - 12.2 he no longer had the climbing shoes which had been taken by his successor, a man by the name of 'Kuina';
 - 12.3 the jack was given to him personally by a man by the name of 'Tupou' when the container of the items was being packed in the United States, "as a gift for him because Tupou knows [the Defendant] very well and he is hard working at the plantation";

-
- 12.4 the Plaintiff gave the timber to the Defendant as a gift to assist him to build a small shed for the boat;
- 12.5 he had already sold the compactor; and
- 12.6 some of the fishing nets were not used because they were "not good enough for fishing".
13. As at that date, the Defendant's counterclaim remained on foot.
14. The trial of the proceeding commenced on 25 August 2021 and some evidence was taken from the Plaintiff in the USA by AVL. During the course of that evidence, and after enquiries from the Bench about the nature of the pleaded defence that was then being put to the Plaintiff, Ms Kafoa took instructions and then informed the Court that the Defendant wished to withdraw his entire counterclaim and further amend his defence to allege:
- 14.1 a partnership with the Plaintiff whereby the parties agreed to a share of the profits from the proceeds of the plantation once the crops had matured and been harvested; and
- 14.2 that the disputed items were given to him, not as part of that partnership agreement, but as an acknowledgement by the Plaintiff of, or as "a bonus for", the Defendant's "very good work" on the plantation.
15. The Defendant was granted leave to discontinue his counterclaim and to amend his defence. Consequential directions were made, and the trial was necessarily adjourned part heard.
16. On 14 September 2021, the Defendant filed his Further Amended Statement of Defence. Of present relevance were the following allegations, set out hereunder verbatim:

"[5] The Defendant... states that all those goods were given by the Plaintiff to the Defendant as a reward for his hard work and great effort he put in their partnership project where Defendant believe that [the disputed items] are gifts...

...

xv. That all the items claim [sic] by the Plaintiff in this matter, were given to the Defendant by the Plaintiff as a part of rewarding him to his hard work did at their project. It was not at the commencing of the partnership

agreement, but it was given voluntarily by the Plaintiff as he was satisfied with the work at the plantation did by the Defendant.

[6] The Defendant... states that the goods were sending directly to the Defendant as to his own individually needs and desire. Every time the Plaintiff seen the kava and vanilla during our video call, he always excited and told me that he will send me bikes and boats for myself but not for the purpose of the project [sic] gift and for the individual purpose and enjoyment of the Defendant and his family.

...

[10] ... the Defendant further states that all the goods claimed by the Plaintiff were giving [sic] to him (Defendant) as a kind of reward, after the Plaintiff have a good impression for the hard work the Defendants put in their project...

[11] The Plaintiff and the Defendant orally agreed that the Defendant would have TOP \$1 million as his share from their project kava.

[12] The Plaintiff agreed with the Defendant, that after five years of the vanilla project, the Defendant will have the whole of vanilla plants as his own, that will be the [Defendant's] shares from the vanilla project.

[13] The agreement between the Plaintiff and the Defendant were not required the Plaintiff to provide the items in dispute for their project. It was only aroused during the process of the project, after the Plaintiff seen the kava and the vanilla plants through video conversation with the Defendant, then he was impressed with the result of kava and vanilla at the [plantation]."

[emphasis added]

17. The trial was to resume on 20 January 2022. However, on 15 January 2022, the Hunga Tonga Hunga Ha'apai volcano erupted causing a tsunami and consequent widespread damage and disruption throughout much of the Kingdom. On and from 1 February 2022, the Covid-19 pandemic caused further disruptions and delays. As a result, the trial was listed to resume on 26 April 2022, during the next Vava'u circuit.
18. When the trial resumed, the damage from the tsunami to the subsea internet cable and limited satellite connectivity precluded continuation of the Plaintiff's evidence and that of his other witness in the United States by AVL. Therefore, the parties agreed for the Plaintiff's Vava'u witnesses to give evidence followed by the Defendant and his witnesses whilst in Vava'u.
19. After two days of that evidence, the trial was then further adjourned to resume in Nuku'alofa on 17 June 2022 to take the AVL evidence. Ms Kafoa reserved the right to recall any of her witnesses to respond to any viva voce evidence given

by the Plaintiff or his overseas witness.

20. It also became apparent, during the evidence of the Defendant, that the parties had not fully prepared or filed their evidence in relation to the quantum of the Plaintiff's alternative claim for damages. Therefore, it was agreed that the trial would be split so that this first phase is concerned solely with issues of liability, and that if the Plaintiff is successful on liability, a second phase will be conducted, with separate directions, for the determination of quantum in respect of any of the disputed items which the Defendant is unable (or unwilling) to return.
21. On 17 June 2022, the Plaintiff and his son gave evidence from the United States by AVL.
22. Finally, on 22 June 2022, the Defendant and his wife were recalled for rebuttal evidence in respect of certain aspects of the evidence of the Plaintiff and his son.

Evidence

23. Evidence in chief was given by way of briefs of evidence filed and affirmed during the trial. Other evidentiary documents as referred to by the various witnesses in their briefs were included in the court book and received into evidence without objection. Each of the witnesses was cross examined.
24. From all that, the relevant evidence may be summarised as follows.

Parties

25. The main protagonists in the proceeding are the Plaintiff ("**Paea**") and his eldest son, Sione Hausia ("**Sione**"), and the Defendant (referred to as "**Tupe**") and his wife, Koletu 'Otukolo ("**Koletu**").
26. Paea and Koletu are first cousins. Paea is originally from Pangaimotu. He and Sione reside in California where they are involved in a construction contracting business.
27. Prior to the subject project, Tupe worked as a farmer and fisherman. Koletu runs a small store.

The plantation project

28. In 2018, Paea was prompted by his father to establish a kava and vanilla plantation in Vava'u to provide employment for his fellow villagers and to develop

the market overseas and locally for those products.

29. Paea dedicated his own tax allotment, known as “Vaotakape”, to the project. He also procured the use of two other allotments, making a total of 20 acres. One of those allotments was via a leasehold agreement in respect of 7 acres of “Kaipahale” between the owners of that land, Iasinito and Piheloti Hausia, (Paea’s parents) and Sione (their grandson) as lessee. Their agreement dated 23 March 2019,² recorded, inter alia, that the term of the lease was five years, \$2,500 had been paid, other payments would be allocated during the term of the lease, and Sione was to provide materials for the perimeter fencing. Further, and more relevantly, the agreement provided that:

“A vanilla project will also be planted in the property of Kaipahale, but after five years on the lease; the vanilla project will be a 50/50% between the landowner, Iasinito Hausia / Piheloti Hausia, and of the lease (Sione Maloni Hausia). This partnership will continue until one of the ownership may buy off the other 50% ownership, at a price agreed by both parties.

Any hired helpers for the Sione Maloni Hausia project will only enter the property of Kaipahale when accompanied by the project managers, Tupe or Koleti Taukolo [sic].

The project manager Tupe/Koleti 'Otukolo, will have the privileges to the property of Kaipahale, except to the designated areas assigned to Toni/Lina Faleovalu. I wish for all parties involved in the property of Kaipahale, to maintain sincere respect to each others peace with kindness at all time.

...

I will pray for everyone involved in this project of blessing. We also need to keep a connection line of honest communication between all parties, for we are all one TEAM in many locations. Paea’s vision needs good people like us to see it through...”

Nature of the parties’ working relationship

30. Paea gave evidence that in about September 2018, he approached Tupe and asked him if he would supervise and manage the project, recruit workers for the planting, and keep and safeguard the plantation, for which, Paea said he would pay Tupe \$500 per week. Paea was responsible for financing the project by sending money each week from the United States to Tupe and Koleti for payment of all the expenses for the project including workers’ wages and other operating costs. According to Paea, Tupe and Koleti agreed. Sione corroborated Paea’s

² CB 129-131.

evidence of an employment agreement with Tupe.

31. Tupe and Koleti provided two briefs of evidence.³ Both were contained in the court book although during the second phase of the trial, Ms Kafoa indicated that they only relied on their further briefs of evidence.
32. In their first briefs, the only reference to the nature of the working arrangement with Paea was that he asked Koleti whether she and Tupe would assist him with the project, to which they agreed, and that there was:

'... no confirmation of any wages ... as were all agree that the project is for all of us.'

33. In his second ('further') brief, confirmed at trial, Tupe added:⁴

"9. In commencing our project agreement, there was no indication of any goods or items Paea will may provide, such as those items being in dispute.

10. Our project agreement, were very well understand by all of us, that most of the financial expenses of the project, Paea will accountable to it, while planting and maintaining of the kava and vanilla will be my wife and myself.

11. There were are time, myself paying for some financial expenses related to the process of the project, such as paying part of the vanilla shoots, buying meats for the workers' meals, fill the truck's fuel and other small things.

12. Our partnership agreement with Paea, that my share from the project will be TOP\$1 million from the amount of money earned from the kava only. He estimated that the kava would probably worth \$2-\$3 million, then deduct US tax, and pay my share of \$1 million, then he will keep the rest for the cover his expenses from the project.

13. For the vanilla project he told me, that after five years from harvesting the vanilla, all vanilla plants will owned by myself as my share from our project."

34. In her further brief of evidence, Koleti added:

"7. We (Paea, Tupe and myself) the project is all belong to us, and most of the financial expenses will be bear by Paea, and doing the project here in Tonga, is Tupe and I.

8. We are agreeing that our share from the project is \$1 million from harvesting the kava. The vanilla will be owned by Tupe and I after five years of the project, that's the share we should receive from the vanilla."

35. During his cross-examination, Tupe said that Paea promised to give him the \$1 million at the time when he first planted the vanilla in 2019. Prior to that, Tupe

³ 3 August 2021 and 8 September 2021.

⁴ Verbatim from the translated version filed.

said the arrangement was that he and his family would 'get a living out of' working on the plantation. When asked what he meant by 'a living', Tupe said that he would 'get money from it'. When asked how much, Tupe said \$1 million and after five years, he would get the vanilla.

36. At one stage during his evidence, Tupe volunteered that the \$1 million from the kava was to come from what he estimated to be \$12 million worth once harvested (although Koleti said that figure came from Paea). In relation to the vanilla, which covered some 8 acres, Tupe estimated, based on a rate of US\$1,000 per kilogram, that the harvest would be worth somewhere between \$2 million and \$3 million.
37. Meghan 'Otukolo, Tupe and Koleti's daughter, said that she was present during most of the initial video calls between Paea and her parents because she had to help set up the calls. She recalled at one time, '*Paea called Tupe for them to partner up in this project*'.⁵ Mrs Vaihu suggested that the correct translation of the Tongan phrase used in Meghan's brief of evidence was 'work together'. Ms Kafoa did not disagree and Meghan confirmed that translation.
38. Semisitoni Faleovalu was one of the plantation workers. He gave evidence that he overheard Paea say to Tupe many times during their video calls that the project '*is for both of us*'. During his cross-examination, Semisitoni said that once in 2020, Paea told him that if the business went well, he would offer Tupe and Koleti \$1 million once the kava was sold and then give them the vanilla 'to run' and sell the produce to him. Paea denied that and added that he would never share something like that with someone who was not his family.
39. Paea and Sione denied any partnership or profit-sharing arrangement with Tupe and Koleti. Paea said that the first time he had heard of the alleged \$1 million was when it was put to him during his cross-examination. He regarded the suggestion as 'vague' and 'absurd' because at the start of the project, he had no idea how much profit it might make once the kava and then later the vanilla was ready for harvest.
40. Sosefo Kalu, who was also one of the workers, gave evidence that Tupe always

⁵ Brief of evidence at [5].

told them that they were working for Paea and he never once heard Tupe say that the project belonged to both he and Paea.

Financial and other operations of the plantation

41. Work on the project commenced in November 2018. Paea sent \$2,000 to Tupe for the preparation works including weeding, ploughing, etc. That work cost \$1,200. He let Tupe keep the balance. Tupe said he and his children commenced the works by gathering wooden posts to make a fence around the tax allotment.
42. Paea said that the kava shoots were obtained free from his cousin, Tonga Wolfgram at Mataika, and that Tupe and the workers went and got them and planted them. He said the vanilla shoots cost \$200 per truckload and that he paid that to Tupe to purchase shoots for planting. After paying \$1,000 to Tupe, Paea said he found out that the price 'was a lie' and that vanilla shoots could also be sourced for free and so he stopped paying Tupe for any more shoots.
43. Tupe said he obtained the vanilla shoots for free from Tupe's friend 'Fono'. However, he further said that Paea only ever sent \$200 for one truckload of vanilla shoots and told Tupe that he would send more money for more shoots but never did. Koletu said that 'there were almost 20+ trucks' of vanilla shoots but they only received \$200 from Paea for one truck. That number of truckloads was corroborated by Jordan Malimali, another of the workers.
44. Once the planting commenced, eight workers were employed. The number of workers fluctuated during the course of the project from a minimum of three to a maximum of 13, according to what work was required from time to time. Tupe and Koletu said that Paea dictated how many workers were employed at any one time. All relevant witnesses confirmed that the workers were each paid \$300 per week from money sent by Paea. One of the workers, Vai Petelo, described Tupe's work as 'just walking around and keeping an eye on the works'. Tupe denied being only a supervisor and said that he 'did the hardest work'.
45. Paea gave evidence that money was sent to Koletu each week in accordance with the amount advised by Tupe the week before to cover the workers' wages, \$500 for Tupe's wage and an additional \$500 for operating expenses. He said that during their working relationship, Tupe and Koletu never complained to him about not receiving any or enough money each week. He always sent them the

amount Tupe requested.

46. Tupe agreed that Paea always sent the amount of money Tupe requested. However, Koletti described the \$500 for expenses each week as always 'being short' of what was actually required for items such as food, weedkiller and fuel. She said that when she told Paea about that over the phone, he would get angry and tell them to work it out. She said they were scared to ask for more money in the future. Tupe did not give similar evidence.
47. The documentary evidence adduced by Paea included:
- 47.1 screen shots of Messenger messages between 25 July 2019 and 23 January 2020 including the headers (tracking numbers) of Western Union receipts, although they generally did not show the amounts sent; and
- 47.2 a number of Western Union transfer details and account statements between 2 November 2018 and 29 July 2020.
48. Paea's financial records were not complete. He said he did not keep all the records because he did not expect to be involved in future litigation at the time. On the basis of an average exchange rate of TOP\$2 to US\$1 for that period, the available records showed the following payments:

Date	TOP
2/11/18	520
3/11/18	208
8/11/18	620
23/11/18	515
27/11/18	206
4/9/19	2400
16/9/19	1000
19/9/19	3000
26/9/19	3000
10/10/19	298
13/11/19	298
13/11/19	573
13/11/19	2280
21/11/19	3000
28/11/19	3002
19/3/20	2501
2/4/20	3800
29/7/20	2550

49. The records showed that most of the funds were received by Koletti and sent by

Sione with one payment being sent by Selafina Hausia and another by Ana Hausia.

50. Sione gave evidence that he visited Tonga on five or six occasions during the time that Tupe and Koletu were working on the plantation (and up until the Covid-19 pandemic border closure). On each of those occasions, Sione spent half his time in Vava'u (a total of about 5 ½ months) and went to the plantation. When he was there, he did not transfer money to Koletu but paid the workers himself, including, he said, giving Tupe \$1,000 per week to cover his wage of \$500 and the balance being for operating expenses. He said that when he was handling the money, they were never any complaints from Tupe or Koletu. Sione's evidence in relation to him handling the payroll when he visited the plantation was corroborated by Fonua Nau. Tupe and Koletu denied it.
51. All up, Paea said that he had sent over TOP\$300,000 to Tupe and Koletu for the project but he could not say for sure how they spent it. He assumed they must have recorded such matters 'somewhere'. However, Tupe and Koletu said that they did not keep any financial records, whether of moneys received, numbers of workers from time to time or moneys spent because Paea told them that as they were family, there was no need for them to keep any financial records. Paea denied saying that. He said that initially Tupe and Koletu provided some financial reports but when they stopped, he didn't press it because he then trusted them.
52. Tupe and Koletu denied that Tupe had ever been paid any wages for the entire time he worked on the project from October 2018 to August 2020. Tupe said further that:
 - 52.1 he never included \$500 for his own wages in the amount he told Paea to send each week;
 - 52.2 after the workers' wages were paid from the amount sent each week, there was only \$500 left over for fuel and other operating expenses;
 - 52.3 he never asked for any wages because the plantation 'belonged to all of them'; and
 - 52.4 the other worker witnesses who said that he did receive wages were lying.
53. Bryan 'Otukolo, Tupe's son, was not aware of any wages being paid to Tupe or

Koleti. Meghan 'Otukolo helped Koleti prepare the pay packets for the workers. She said she did not see any packet for Tupe.

54. Lomio Tonga was another of the plantation workers. He gave evidence that Tupe said several times that he was getting paid \$500 per week and \$300 per week for petrol all from Paea.
55. When asked what he lived on during the almost two years he was working on the project, Tupe said that before the plantation work started, he travelled to the United States in October 2018 for three months from which he saved US\$20,000 and again in 2019 for one month from which he saved US\$3,500, working with his uncle and brothers in construction. During those periods, Tupe said that Koleti looked after the plantation. Tupe added that their family overseas also helped them by sending between TOP\$500 and \$1,000 per fortnight while Koleti wove mats and her little shop generated between TOP\$300 and \$400 per month.
56. Koleti gave evidence that she and Tupe also helped financially with the work when Paea's 'shortcomings' required them to do so. For example, she said, a fig tree had to be cut down. It took five truckloads to remove it. She felt that the person helping them should receive some money. Paea told them to give the person \$200 and he would pay them back but he never did. Later, Koleti said that Paea told her to take the \$200 out of the money he sent them. However, she said, she had to withdraw that money from her shop proceeds.
57. In relation to the vanilla shoots, Koleti confirmed that they received \$200 from Paea. However, she said that when the next person they got vanilla shoots from also wanted \$200, Paea paid that person directly.
58. When she was asked what she and her family lived on during the time they were involved in the plantation project, Koleti said that her shop generated profits of between TOP\$300 and \$400 per month, they received assistance from family members in the United States and she wove mats. Koleti made no mention of any money earned by Tupe during his visits to the United States. Her only reference to Tupou travelling to the United States was that he did so in 2019 for a month for their granddaughter's birthday.
59. Koleti said that Tupe worked at the plantation full time, Monday to Saturday, and was only not there when he was fishing for the workers or attending to church

matters. Paea said that when he called, Tupe was often not at the plantation but either at his house or at their little shop.

The disputed items

60. Paea confirmed in his evidence that he sent the disputed items in two shipping containers from the USA and New Zealand to Tonga. Two import entry documents⁶ recorded that one shipment arrived in January 2019 and the other arrived in July 2019. Both named Koleti as the importer. The items listed included quad bikes, a boat, a trailer, timber, fishing nets and a Ford Escape vehicle. The other items included various building materials, foodstuffs, clothing and household furniture and furnishings.
61. In their evidence, Paea and Sione said that the disputed items were sent for the purpose of assisting the work on the plantation, building a house there for their family and that the boats were for fishing to help feed the workers and for use by them and their family when they travelled to Vava'u. Consistent with that purpose, they both testified that the items were given to Tupe for their intended use, and they denied ever telling him that they were for him and his family to own. Sione described Tupe as a 'caretaker' of the items.
62. Lomio Tonga testified that:
- 62.1 when the items arrived, Tupe told him that they had been sent by Paea for use in Paea's works and that the fishing nets, also from Paea, were to help feed the workers;
- 62.2 Tupe never said that the items had been 'gifted' to him; and
- 62.3 he saw Tupe and other workers using the quad bikes to transport water and other items around the plantation.
63. Vai Petelo said he saw Tupe, Koleti and their children riding the quad bikes around the village and to the plantations and bringing fish from the nets. Sione also saw the quad bikes being used for transport to the plantation and taking things such as water to the workers there.
64. Tupe and Koleti gave evidence that the disputed items were 'gifted' to them by

⁶ CB 187, 188.

Paea because he was 'amazed' at Tupe's efforts in the project and that they were a 'reward or showing appreciation' for the good work. More specifically:

- 64.1 the quad bikes, boats, fishing nets and outboard motor were given to Tupe and that the small bikes were given to their two sons 'as they tired of doing our work';
 - 64.2 the other two large quad bikes were for Tupe;
 - 64.3 the big boat was a gift for Tupe and his family so that 'if after work [he was] exhausted, [he could] cruise with [his] family and enjoy';
 - 64.4 the small boat was a gift for their two sons 'to use if they needed';
 - 64.5 the fishing net was also a gift for Tupe to 'help with their meals' although they were not suitable for the 'type of fishing here';
 - 64.6 the timber was 'gifted to [Tupe for him] to build a shed for the boats';
 - 64.7 the pipes were left inside the container because Tupe did not have time to take them with him when he left the project;
 - 64.8 the climbing shoes were also a gift although Kuina Fatai took them when he took over managing the project;
 - 64.9 the jack was given to Tupe by a man named Tupou in the USA when they were packing the container because Tupou 'knew of the hard work' Tupe had been doing; and
 - 64.10 after they arrived, Tupe took a number of the items to his home.
65. Bryan 'Otukolo was studying in China when the project commenced but upon his return, he joined in planting the kava. He gave evidence that during one of Paea's video calls with Tupe, Paea showed them all quad bikes and told Bryan '*that he [was] willing to give the bikes for me to easiness for myself and doing the work*'.
66. On another occasion, Bryan said that Paea showed Tupe a green bike and said that 'it was his', together with another bike and that both were 'a gift for him for doing the work'. Paea told Bryan that the big red bike was for him and that the small bike was for his younger brother Douglas. In relation to the boat, Bryan said that Paea called and showed the boat to Paea and said that whenever he was exhausted from the work, he could go with his family in the boat and cruise

around and that was 'just a gift for ... for doing their work'. The small boat was given to him and his brother 'as a gift' for their work at the project.

67. Semisitoni Fealeovalu gave evidence that he overheard Paea say to Tupe during one of their video calls that 'this is your boat, whenever you feel tired take your family for a cruise'. Similarly, he said that Paea told Tupe about the quad bikes 'for' Tupe's sons. During his cross-examination, Semisitoni said that a lot of people used the quad bikes including the workers and Tupe's sons, to take things like shoots around the plantation and water to the workers. They were 'part of the normal operations at the plantation'. Paea denied giving either of Tupe's sons quad bikes to keep but he did give them bicycles among the other gifts.
68. Meghan 'Otukolo had a slightly, but importantly, different recollection. In respect of the boat and the quad bikes, she recounted Paea saying to Tupe and her brothers that they were for them 'to use'. In cross-examination, Meghan confirmed her understanding of the distinction between something being given to someone to use as opposed to the thing being given for that person to own. She was adamant that the items were given by Paea for Tupe and her brothers to use.
69. Jordan Malimali said he too overheard Paea telling Tupe about:
- 69.1 two red quad bikes being 'for his two sons to having it and for them to drive around';
 - 69.2 'the boat is Tupe to having it and used for fishing'; and
 - 69.3 'two green bikes he told to Tupe it's for him to own it and use it for their work'.
70. Jordan also referred to Paea telling him he would give Jordan a bike 'to use' but he did not receive one.
71. Viliami Piukala, who was also one of the workers and a town officer, testified that Paea told him '*Tupe will coming here (US) to take with him his boat, then you guys can go fishing and have beers after work*'.⁷
72. Paea denied all the above accounts by Tupe, Koleti and their other witnesses

⁷ [4]

(apart from Meghan's reference to the items being given 'to use').

73. Sione gave evidence that during one of his visits to Vava'u, he took the speedboat out to see if it worked and how the engine ran. He said that:
- 73.1 the boat was stored at Koleti's sisters' house at that time because Sione's family house had not been built;
 - 73.2 he did not ask Tupe for permission to use it, he just told him he was taking it;
 - 73.3 he did not need consent because it was his family's boat; and
 - 73.4 Tupe, who went out with them, did not object, nor did he (or Tupe's other family members) ever assert to Sione that he owned the boat or any of the other disputed items.
74. By contrast, Tupe said that Sione asked him if he could go 'for a cruise' in the speedboat.
75. Sione also gave evidence of he and his father paying for services and repairs for the boat and that they sent parts over for it which cost just under US\$2,000. That evidence was not challenged.

Other gifts

76. Paea also confirmed in evidence that during the course of their working relationship, he sent the other gifts of cash, household goods and foodstuffs (referred to in paragraph 10 above), in appreciation for Tupe's work, and allowed Tupe to plant root crops on the plantation to help feed his family and the workers. Paea claimed that the total value of the other gifts was US\$30,700.
77. Tupe and Koleti acknowledged receiving some of the other gifts although they denied receiving any cash. They also complained that the foodstuffs had expired which led to Koleti's store being closed down by the health authorities, that the clothing provided was of such poor quality that it was thrown in the rubbish and that other gifts were damaged or also of poor quality.
78. It was common ground that Paea allowed Tupe to plant root crops in unused portions of the plantation to help his family and feed the workers. However, Paea took issue with the fact that Tupe used the employed plantation workers to tend

to those crops. Lomio Tonga gave evidence that Tupe told he and the other workers at the time that all the plants and root crops belonged to Paea.

79. Paea said that those crops were all harvested for, and sold by, Tupe in Vava'u and Tongatapu and that Tupe retained those proceeds. Fonua Nau corroborated that evidence. However, Tupe said that because Paea 'banned' him from the plantation, he was unable to harvest and sell the crops and therefore suffered financial loss. Koleti said they took part of the crops when Paea 'chased them off' the project, but most were left behind. Bryan 'Otukolo said that only one row of cassava was harvested. During his cross-examination, Paea refuted Tupe's evidence by explaining the different growing times for the various root crops and that if they had all been left to when Tupe and Koleti departed the project, many of the crops would have been rotten.

Termination

80. According to Paea, his relationship with Tupe began to sour in early 2020, when the national Covid-19 lockdowns commenced, because Tupe stopped providing regular (in fact, they had been mostly daily⁸) video call reports on the state of the plantation. They argued over Tupe's reluctance to do so. When Paea then got others to video the plantation for him, Tupe became angry. When Paea saw that parts of the plantation were in poor condition, after nearly two years of work and investment, he 'scolded' Tupe. While he admitted to raising his voice with Tupe, Paea denied swearing at or threatening Tupe, in case it might have prompted Tupe 'to damage the crops in some way'. He said it was Tupe who swore at him.
81. Semisitoni Faleovalu gave evidence that Paea contacted him through Facebook and asked Semisitoni to report to him about the state of the works. Semisitoni agreed and after work each day, he sent photos to Paea of what had been done that day. He said he felt Paea 'did not trust them'. He described Paea as being 'always angry'.
82. Sione added from his own experience during visits that another reason for Paea and Tupe 'falling out' was that as time went on, Tupe started asking for money for other things such as church obligations and unexpected expenses. Sione

⁸ Cf Jordan Malimali at [14]: '... Paea will call Tupe almost 20 times a day...'

confirmed that at the end of the relationship, he saw that many parts of the plantation were in poor condition and that he and his father had to go into 'recovery mode'. Sione also gave evidence about the breakdown of trust in Tupe. One example he gave was in relation to the number of workers claimed by Tupe. On one occasion, Tupe claimed wages for workers for a day when it was raining. Sione asked one of his uncles in Vava'u to check on the number of workers. Tupe had told Sione there were 10 workers present whereas Sione's uncle reported only three.⁹ When he challenged Tupe about that, Tupe initially denied it and then became defensive.

83. According to Tupe, it was he who terminated the relationship. He and Koleti attributed the breakdown in the relationship to Paea's insistence on video calling for a report on the project even during family time as well as his abusive language towards Tupe in front of their children including threats that 'he could have someone come and shoot Tupe'. That evidence was corroborated by their children. Paea denied that and said that he 'did not know they would stoop so low as to say something like that'.
84. Further, during his cross-examination, Tupe said that he 'sensed at the time that Paea no longer trusted him'. He said he did not know why because they 'never argued about money'. He said he had no idea why Paea's attitude changed towards him and denied that Paea was ever unhappy with Tupe's work or the progress of the plantation. Tupe said he 'felt imprisoned' because Paea had someone else videoing the work every day.
85. On 29 January 2020, Paea's then lawyers, Edwards Law, wrote to Tupe, and gave notice of termination of his services, in the following terms:

"It is clear from Paea Hausia and his son Sione Maloni Hausia that you are the person that is looking after and tending to their plantation and they have abundantly helped you out. Up to now they have ceased any reliance on you and they want you to vacate immediately from their plantation as well as the two tax allotments they are situate [sic].

Paea Hausia and his son Sione Maloni Hausia are now in the process of engaging a new person to continue what you have been doing in overseeing their plantation. Therefore they want you to return all tools they acquired to

⁹ Even though that evidence was hearsay, Ms Kafoa did not object to it either during trial or in her closing submissions.

be used in taking care of the crops and they do not want you to be near or involve [sic] in the work that is being carried out. ...”

86. The evidence did not include any response to that letter from Tupe.

87. On 9 September 2020, Edwards Law again wrote to Tupe, relevantly, as follows:

“We represent Paea Hausia who currently resides at the USA and advise you in this letter direction from Paea for you to vacate from his tax allotment where he has his plantation the moment you receive this letter.

It is understood you were the person that cared for Paea’s plantation and all his works in Vava’u and there has been great dissatisfaction on the part of Paea relating to your work relationship.

Paea also wants all his tools which includes truck, two bikes, both and outboard motor and all his properties and tools given to you to use in his work in looking after his plantation.

All powers in connection with taking care of all of Paea’s plantation has been invested on Kuina Fatai of Pangaimotu and Paea now want you to remove all your crops planted on the plantation but you have to first inform Kuina before you can be able to complete removing your crops.

We therefore give you 24 hours to complete return of all of Paea’s tools and you are to return all of these to the tax allotment and store them in two containers currently located thereon and Kuina Fatai will be there to take care of the tools. Paea has assisted you a lot and it is understood that you do not appreciate this resulting in a lot of damages. ...”

88. The same day,¹⁰ Mr Taufaeteau, who then acted for Tupe, responded, relevantly:

“... Paea asked and Tupetaiki accepted to care for and look after his plantation and also other works. Tupetaiki has agreed and accepted to vacate because Paea is a difficult person, he does not appreciate all the works and assistance given to him, because this is not the first time something like this happen. Tupetaiki in the past wanted to vacate several times but for numerous requests by Paea for him to come back and continue on with the work.

Only the truck and tools used to look after the crops like weed eater, sprayer, shredder machine, 2 x containers will be returned.

The two bikes, boat and outboard motor, and other tools are properties of Tupetaiki which Paea gifted him which was a form of payment for accepting his request to become the caretaker for his crops. ...”

89. On 14 September 2020, Dr Latu (then) of Edwards Law replied, relevantly, as follows:

¹⁰ Though the letter appears to have been erroneously dated 9 August 2020 it was stated to be in response to Mr Edwards’ letter of 9 September 2020.

“... We are instructed by Paea to advise that the work relationship with Tupetaiki was that he was paid weekly and Paea had assisted Tupetaiki a lot including assets and money and also his visit to the [sic] America and return with goods and money that were gifted to him by Paea which is totally different from Paea's properties given to be used in running his plantation and works at Vava'u.

There has been countless blessings received by Tupetaiki out of his working relationship with Paea and Paea has paid for Tupetaiki's work because it was undertaken on a mutual basis and spirit of helping each other with love because they are family and also friendship.

Paea vehemently denies any agreement for the two bikes, boat and outboard motor and other stuffs alleged to have been owned by Tupetaiki through Paea gifting these to him based on his acceptance to look after Paea's plantation. Like what has been said before, Tupetaiki was paid and there were plenty of gifts given separately and these facts are well known by people of Pangaimotu and workers of Paea

Paea wants all properties to be returned by Tupetaiki and these properties are relevant for use in looking after his crops but is being possessed by Tupetaiki and were not intended to be gifted. If Tupetaiki's version is to be accepted then there would be no more tools to be used by Paea to continue the work that he employed Tupetaiki to take care of. Not only that but this would be very unreasonable for Tupetaiki to gain more than the result of his work for Paea in view of his livelihood earning [sic] capability....”

90. On 17 September 2020, Mr Taufateau wrote, relevantly:

“... According to Tupetaiki he was not paid weekly. The weekly wages of the employees were taken and the left over was \$500 for operating expenses petrol for the truck, feed for labourers, petrol for chainsaws, petrol for weed cutting, and it is true Paea assisted by gifting of money and goods for Tupetaiki as payment for his acceptance of his request to look after his crops, and he was in contact with a different person. After he accepted the request because he pitied his wife who is his cousin. The tools used to maintain the crops have been approved to be returned. They were goods gifted by Paea and were video recorded¹¹ by Paea from America and Tupetaiki was in Vava'u he said look at your boat, bike, outboard motor, fishing net and there are many witnesses who can testify about these words uttered by Paea.

...

To say that blessings and gifting to Tupetaiki were and reasonably big, it is very wrong. The Kava plantation are going to be harvested next year and the following year will yield huge amount of money not near any blessings received by Tupetaiki and the same goes to the vanilla when the time to harvest.

¹¹ No video recordings were tendered at trial.

To say it is his source of income this is wrong. Paea requested Tupetaiki who was alright, he had built a double story house complete with all facilities, has had four vehicles up to now and his trip overseas has not stopped.

Tupetaiki is saying the life he had was stressed, improvised [sic] and ill-health due to the very very bad attitude of Paea. He has threatened him a lot of time saying it is not hard to hire someone to shoot Tupetaiki and this was witnessed by his wife and children. ...”

91. Mr Taufaeteau then referred to the list of the disputed items as either having "already given away" or "herewith returned" or "still inside the container" or "all broken" or "there were none".
92. On 28 November 2020, Ms Kafoa wrote on behalf of Tupe and Koletu to Kuina Fatai, who had been employed by Paea to take over the management of the plantation. Ms Kafoa made claims and demands in respect of certain pineapples that Tupe and Koletu had planted and had been picked without informing them and that other crops at the plantation belonged to them and "did not form part of the agreement for work with Paea".

Defendant's undertaking

93. Tupe said that after termination, he arranged to have a number of the quad bikes registered in his name.
94. Paea said that when Tupe left the project, there were no pipes, climbing shoes or the jack left in the container. He denied Tupe's explanation for the jack and said that it was not a gift from a friend in the USA but rather for use with the truck. Further, Paea said that the timber was never used by Tupe to build a shelter for the boats as was intended and that they too cannot be found. So too, the pressure washer, which was intended for cleaning the vehicles, boats and quad bikes, could no longer be found. The trailers, which were also missing, went with the quad bikes.
95. However, Mrs Vaihu advised that in accordance with Tupe's undertaking, the only disputed items that were recovered and kept in safe custody were the four quad bikes, the speed boat, a small boat, a 150 hp outboard motor, one small outboard motor, two weed sprayers and one of the trailers.

No other claims prior to these proceedings

96. Paea and his son Sione reiterated that at no time during their working relationship

with Tupe did he ever complain of not being paid his wages or of any other financial issues.

97. At no time prior to the commencement of proceedings, did Tupe ever make a claim on Paea for unpaid wages.
98. Further, and to date, Tupe (and/or Koleti) have never made a claim on Paea in respect of the alleged partnership agreement, which according to Tupe, was worth several millions of pa'anga. When asked why their then lawyer's letter of 17 September 2020 did not contain any mention of the alleged partnership or promises of \$1 million for the kava or the millions expected to be derived from the vanilla, Tupe and Koleti said that Mr Taufateau 'was sick' and asked them to find another lawyer in Tongatapu and that their evidence 'was not prepared well at that time'. Koleti later added that the reference in his letter to 'a form of payment' was inserted by Mr Taufateau himself, that he made 'lots of mistakes' and that he returned their documents to them. Mr Taufateau was not called to give evidence.
99. Tupe and Koleti then engaged Mr Paula Tatafu, but he apparently could not take their case. Close to Christmas 2020, they engaged Ms Kafoa. However, they did not instruct her to write to Edwards Law to correct the 'mistakes' in Mr Taufateau's earlier correspondence even they said that they 'explained everything to her'.
100. Tupe and Koleti explained that they 'gave up' on pursuing their financial entitlements on their alleged partnership arrangement with Paea because they felt 'imprisoned and abused' by Paea through his abuse and threats, and they wanted nothing more to do with him. Despite being aware of the millions of pa'anga potentially involved, Koleti explained, at different times during her evidence, that she and Tupe never instructed any of their lawyers to sue on the partnership claim, because:
 - 100.1 they 'didn't really understand about it';
 - 100.2 she 'kind of thought they would only have to tell about it in court'; and
 - 100.3 their 'level of intelligence was not high enough for that'.

Submissions

101. Both counsel provided helpful, written submissions. As expected, each identified those aspects of the evidence which supported their respective client's cases.
102. In addition, Mrs Vaihu submitted, in summary, that:
- 102.1 the Defendant has failed to discharge his onus of proving that the disputed items were given to him and his family to own;
 - 102.2 in respect of the Defendant's version of the financial relationship between the parties, [who] 'would be in his right mind to give away extravagant amounts and gifts when the project was still one year old in the year 2019 [and] when the yield was not ascertained';
 - 102.3 the evidence of the Defendant's wife and children was not independent;
 - 102.4 'the court must look at the circumstances of the case and the relationship [between] the parties in order to determine the basis upon which the disputed items were given;
 - 102.5 the Defendant made up his evidence about not being paid any wages in order to justify keeping the disputed items, and it should be rejected;
 - 102.6 the Defendant's allegations of a partnership did not appear in any of the pre-litigation correspondence issued on his behalf; and
 - 102.7 further, having regard to the undisputed fact that the Plaintiff provided all the financial resources for the project and that the Defendant was only required to supervise the works, recruit workers and report to the Plaintiff, the principles discussed in *Tu'itutou v Cocker* [1989] Tonga LR 49 clearly indicate an employment relationship, not a partnership.
103. In support of the Defendant's contention that the Plaintiff's claim should be dismissed, Ms Kafoa also submitted, in summary:
- 103.1 the Defendant is entitled to retain the disputed items as they were given as 'gifts/appreciation to him and his family';
 - 103.2 'property is gifted by one person (the donor) to another (the donee) when the donor voluntarily and gratuitously transfers the property to the donee without receiving consideration and with no intention that the property will

be returned to him: *Tauelangi v Hemaloto* [2016] TOSC 22;¹².

103.3 it is for the donee to prove that the gift was the result of the donor's independent will; it is not enough to show that the donor understood the transaction: *Curtis v Curtis* [2011] EWCA Civ 1602;¹³

103.4 the Defendant, as donee, has proven that the disputed items were given to him by the Plaintiff 'as an appreciation';

103.5 the Defendant entered into a partnership project with the Plaintiff and he and his family worked at the plantation, without wages, as they believed they would 'benefit from the project after harvesting'.

Consideration

104. As noted, the central issue in this case is not whether Paea gave the disputed items to Tupe and his family but whether Paea gave them for Tupe and the others to use or to own.

105. Ownership is defined as "the right to the exclusive enjoyment of a thing. Strictly, it denotes the relation between a person and any right that is vested in him. Ownership is absolute or restricted. Absolute ownership involves the right of free as well as exclusive enjoyment including the right of using, altering, disposing of or destroying the thing owned...": *Taulafo v Mafi* [2020] TOSC 25 at [15].

106. Further to Ms Kafoa's reference, in *Tauelangi v Hemaloto* [2016] TOSC 22, Paulsen LCJ also observed that:

"[23] ... A gift of property is effective when the donor intends it to be gifted and the donee receives the property; there can be no gift without the giving and taking of property (Cochrane v Moore [1890] UKLawRpKQB 67; [1980] 25 QBD 57 (CA) at 76)."

107. Here, therefore, as in that case, it is necessary to examine Paea's intentions as a gift will only be effective where it is intended to be gifted by the donor: *Meisels v Lichtman* [2008] EWHC 661 (QB) at [71].

108. Often, intention will be objectively expressed through contemporaneous, written

¹² Per Paulsen LCJ citing *Berry v Warner (Inspector of Taxes)* [1980] 3 ALL ER 798.

¹³ Paulsen LCJ actually cited *Curtis* for the first limb of that proposition as to the burden of proof and *Allcard v Skinner* [1887] UKLawRpCh 151 at 171 for the second.

communications and such documents will always be of utmost importance.¹⁴ However, in the absence of such evidence, as is the case here, and where the evidence by each side on the nature of the giving of the disputed items by Paea is almost diametrically opposed, the Court is required to weigh the evidence of the witnesses, determine their credibility, and ultimately make findings on the balance of probabilities as to who is telling the truth; or, at the very least, whose evidence is more reliable and therefore which case is to be preferred.

109. The task can sometimes not be an easy one. 'Judges are not given any special powers to discern whether a particular witness is not telling the truth': *Euromark & Limited v Smash Enterprise Pty Ltd & Ors* [2021] VSC 97 at [41].
110. The concept of credibility encompasses the two principal notions of truthfulness and error and that a witness can be truthful but mistaken: *Sika v Fasi* [2022] TOSC 17 at [6].¹⁵ It is open to reject a witness' recollection while still finding that the witness was honest, because recollections may be affected by the fallibility of human memory, unconscious bias, wishful thinking, or discussion of the events with others unconsciously altered: *Prouten v Chapman* [2021] NSWCA 207 at [103]. Further, where a period of time has elapsed since the events in question, it is inevitable that, within the context of any dispute, memory can be overlaid with perceptions, self-interest and elements of reconstruction, irrespective of a witness' commitment to his or her oath. Often, what is actually remembered may only be an impression from which plausible details are reconstructed, often subconsciously, and the very nature of litigation and the processes around preparation for trial can distort memory: *MacIntyre and Williamson Partnership* [2015] NZHC 3012 at [124].¹⁶
111. Further guidance in assessing credibility may be derived from a number of leading cases.¹⁷
112. In *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431, Lord Pearce

¹⁴ *Watson v Foxman* (1995) 49 NSWLR 315 (CA) at 318-319.

¹⁵ Citing *Latu v Lavulavu* [2016] TOSC 5 at [12].

¹⁶ Citing *Watson v Foxman*, *ibid*; *Julstar Pty Limited v Hart Trading Pty Limited* [2014] FCAFC 151 at [73]; and *Onassis v Vergottis*, *infra*.

¹⁷ Referred to in *Excelerate Technology Ltd v Cumberbatch & Anor* [2015] EWHC B1.

observed:¹⁸

" 'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

113. In *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* [1985] 1 Lloyd's Rep. 1, p. 57, Lord Goff:

"... found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

114. In *Wetton (as Liquidator of Mumtaz Properties) v Ahmed and others* [2011] EWCA Civ 61 Arden LJ stated:

"12. ... Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a Defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence,

¹⁸ Also cited in *Sika v Fasi*, *ibid*; *Parsonage (acting as personal representative in the estate) v Parsonage & Ors* [2019] EWHC 2362 (Ch); *Khan v Khan* [2020] FJHC 49 at [41]; *Diamond Engineering Ltd v Prasad* [2021] FJHC 394;

such as evidence in texts or e-mails, in which the Defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.”

115. More recently, and consistent the observations above, in *Pell v Queen* [2019] VSCA 186, 255-6 [897], Weinberg JA summarised the factors that any trier of fact, whether judge or jury, will ordinarily take into account when deciding whether the evidence of a particular witness is credible and reliable, as including:¹⁹

“... the inherent consistency of the witness’ account; the consistency of that account with those of other witnesses; the consistency of that account with undisputed facts; the ‘credit’ of the witness (based upon matters which include, for example, demeanour); any relevant infirmities of the witness; and, importantly, the inherent probability or improbability of the evidence in question.”

116. After considering all the evidence, the submissions and the principles referred to above, and for the reasons which follow, I have come to the view that the evidence given by and on behalf of the Plaintiff was more credible and reliable than that of the Defendant and his witnesses (save for Meghan 'Otukolo) and that the Plaintiff's case is to be preferred as more inherently probable.

117. Even though the main focus and object of the proceeding thus far has been on the disputed items, the issues raised by the Defendant in respect of the alleged partnership or profit-sharing agreement and non-payment of wages during his work on the project attracted a good deal of attention during the proceeding and at trial, and for good reason. The potential value of the alleged partnership agreement, of several millions of pa'anga dwarfed the value (by either party) of the disputed items. Yet, no claim has ever been advanced by the Defendant in respect of those alleged entitlements. Similarly, the Defendant's initial counterclaim in respect of unpaid wages and other amounts was abandoned. Both issues, and the manner in which the Defendant treated them and gave evidence about them at trial are important indicators on any assessment of

¹⁹ Relying upon Sir Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983) 192–3. Ferguson CJ and Maxwell P relied upon the same passage of Sir Richard Eggleston in their joint judgment in *Pell* at [56].

credibility.

118. Firstly, I do not accept the Defendant's allegation of a partnership or profit-sharing agreement with the Plaintiff, for the following reasons:

118.1 Partnership arises from contract, evidenced either by express words or by conduct from which the existence of a partnership is to be inferred. It is not sufficient that there is joint ownership in common; there must be a contract. Statements and declarations, even such as include the use of the words 'partnership' and 'partners', do not prove that the persons making them are partners. The question whether or not there is a partnership is one of mixed law and fact.²⁰ The whole circumstances have to be considered to ascertain the intention of the parties.²¹ That question can only be decided on the whole of the evidence, their conduct, the mode in which they dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people²²: *Tu'itupou v Cocker* [1989] Tonga LR 49.

118.2 In my view, the fact and the terms of the agreement alleged by the Defendant are inherently implausible and commercially nonsensical.

118.3 The alleged involvement of, and financial commitment to, the Defendant is entirely at odds with the arrangements for the project (including ownership) described in the agreement referred to at paragraph 29 above between Paea, his parents and his son, and in which, the Defendant and his wife were only referred to as the 'project manager'.

118.4 I accept the Plaintiff's evidence that he would not have had any real idea at the outset of the project about the likely profitability of it until such time as the kava and vanilla were ready for harvest. In the case of the vanilla, that was expected be some five years after commencement of the project.

118.5 There was no rational reason for the Plaintiff to promise to pay the Defendant \$1 million from the anticipated sale proceeds of the kava when the Defendant's only contribution to the project was performing the role of

²⁰ *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462 (CA).

²¹ *Mollwo, March & Co v Court of Wards* (1872) LR 4PC 419.

²² *Dawson v Helicopter Exploration Co Ltd* (Canada) (1956-8) reported in the English and Empire Digest Vol. 36 (2) 593).

supervisor, for which the Plaintiff maintained that he paid the Defendant \$500 per week while the Defendant originally contended that he ought to have been paid \$1,000 per week. For the almost two-year period in which the Defendant was involved in the project, that contribution could only have been valued at between approximately \$50,000 and \$100,000 at best. On the other hand, the Plaintiff (and his son) bore the entire financial risk of the project.

- 118.6 Further, the allegations in relation to the Defendant and his wife ending up owning the vanilla bordered on the absurd. If their version was to be accepted, the Plaintiff would have paid for all the costs of creating the vanilla crop only to then receive nothing from it and to presumably have to pay for it again by buying the vanilla from the Defendant for sale in Tonga and overseas. It is impossible to see how an arrangement of that kind could be characterised as a 'partnership' or 'profit sharing'.
- 118.7 The failure by either party to have documented, in any form whatsoever, such a significant agreement, if it existed, beggars belief. The complete absence of any reference to it in the Defendant's previous lawyer's correspondence is most telling. I do not accept their vague and unsupported criticisms of Mr Taufaeteau, a very senior and experienced legal practitioner. I have no doubt that if the Defendant had given him instructions in relation to the alleged partnership agreement, Mr Taufaeteau would have referred to it in the correspondence, and with likely far greater emphasis than any reference to the disputed items. That he did not do so is more consistent, in my view, with the fact that the Defendant never raised it with him because it was not the case. It is also to be recalled that upon Ms Kafoa commencing to act, no reference to the millions of pa'anga alleged ever appeared in any of the initial pleadings. Those allegations were only introduced during the course of the trial, when, it would appear, the Defendant and/or his counsel realised that the alleged partnership agreement directly conflicted with the then extant counterclaim for wages which could only have arisen from an employment agreement.

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- 118.8 The reasons given by the Defendant and his wife for not pursuing their alleged rights under the so-called partnership agreement were astoundingly unconvincing. They asserted on the one hand that they were afraid of the plaintiff and his abuse and wanted nothing more to do with him and yet, on the other, in this proceeding, they were prepared to engage lawyers to represent them, and give evidence in court, in the defence of a claim by the Plaintiff the value of which paled by comparison to that of the alleged partnership agreement.
119. Secondly, I do not accept the Defendant's assertion that he did not receive any wages during his involvement in the project, for the following reasons:
- 119.1 The assertion was intrinsically inconsistent with the Defendant's abandonment of his initial counterclaim for unpaid wages.
- 119.2 This complaint, too, never featured in any of the pre-litigation correspondence.
- 119.3 The evidence of the Plaintiff and his son that the Defendant and his wife never made any complaints about lack of wages or any other significant financial issue during their relationship was unchallenged and uncontroverted.
- 119.4 That the Defendant agreed to commit to the substantial project in late 2018 without any agreement as to what he would be paid for his efforts (until the alleged - and now rejected - partnership agreement in 2019) also beggars belief. In that regard, I accept the Plaintiff's evidence that there was agreement from the outset that the Defendant would be paid \$500 per week.
- 119.5 While the Plaintiff's documentary evidence in relation to the amounts sent to the Defendant and his wife was incomplete and imperfect, it provided some objective support for his case in this regard. The Defendant adduced no such records. His and his wife's explanation for not keeping financial records was also unconvincing. Without evidence as to precisely how many workers were employed at any particular time, it is not possible to calculate with precision whether the amounts sent were sufficient to cover the wages of those workers plus \$500 for the Defendant and \$500 for

other operating expenses each week. However, having regard to the undisputed evidence above as to the lack of any complaint by the Defendant during the relevant period, I am satisfied that the Plaintiff has established on the balance of probabilities that he did send sufficient funds each week to cover all expenses including the Defendant's wages.

- 119.6 I do not accept the Defendant's evidence that the Plaintiff dictated how many workers were employed from time to time. Had that been the case, there would have been no need for the Defendant to tell the Plaintiff each week how much money was going to be required because the Plaintiff could have calculated that himself. Instead, he relied on the Defendant to have as many workers as were required to tend to the plantation during the different phases of its development. I also accept the evidence of Sione about the time when the Defendant overclaimed for the number of workers actually employed at the plantation. The Defendant's control over the information being relayed to the Plaintiff, and the lack of any accounting for how much of the operating expenses money was applied each week, provided the Defendant with the opportunity to take advantage of the situation and thereby retain more of the funds sent each week for himself.
- 119.7 It is not surprising that there were no pay packets prepared for the Defendant. The moneys were wired to Koleti's account. From that she would only have been required to withdraw the amount of cash necessary to pay the other workers and for payment of actual operating expenses such as fuel, repairs etc. The balance, including for her husband's wages, would have simply remained in her account.
- 119.8 On this issue, and generally, I found Sione Hausia to be a particularly impressive witness. He gave frank and clear evidence and his accounts about what occurred during the periods he visited the plantation, including his handling of the payroll, had a distinct air of verisimilitude about them. It would have made no sense for him to have sent money to Koleti from his account in the U.S. when he was in Vava'u. Sione's direct evidence of giving the Defendant \$1,000 for his wages and operating expenses during those times was barely challenged in cross-examination, and to the extent

it was, his evidence was entirely undamaged.

- 119.9 The evidence of the Defendant and his wife about their financial means during their time on the project was inconsistent, in part (e.g. Tupe's travels to the U.S.), and unsupported by any documentary evidence. It is more likely, in my view, that they also lived off the Defendant's wages from the plantation and any leftover money from the operating expenses.
120. Thirdly, being satisfied that the Defendant was in fact paid wages for his work on the project, I do not accept that the disputed items were given to him by the Plaintiff to own 'in appreciation' for the Defendant's work on the project. The reason for that lies in the following rhetorical question: why would the Plaintiff give the Defendant items worth over \$100,000 (as contended for by the Plaintiff) in addition to wages of less than \$50,000 during the relevant period? In my view, the Defendant's assertion in that regard is also inherently improbable. The fact that the Defendant attempted to distance the alleged gifts from any term of the alleged partnership agreement only served to further confuse his case because if that were true, then the rhetorical question posed above becomes even more ridiculous.
121. Fourth, the nature of the disputed items, save for the boats, is consistent with their intended purpose as testified to by the Plaintiff, namely, for use in the plantation works and the construction of a house for the Plaintiff and his family there. For the Plaintiff to have intended to give those items to the Defendant, as alleged, would have necessarily meant that the plantation would have not been able to operate satisfactorily once those items were taken away by the Defendant. Again, a nonsensical proposition. It is far more likely, in my view, that the Plaintiff permitted the Defendant and his family to use the items for the purpose of assisting with work on the plantation. Insofar as the boats were intended to be used for fishing to assist in feeding the workers, they too had a connection to the operations at the plantation.
122. In contradistinction, the other gifts, which were mainly household items, did not have any connection with the work at the plantation but did serve the purpose of assisting the Defendant and his family. Further, the value of other gifts, being far less than that of the disputed items, is also more consistent with being gifts to

the Defendant and his family to own.

123. Fifth, with the exception of Meghan 'Otukolo, the evidence of the Defendant and his other witnesses about what the Plaintiff said in relation to the giving of the disputed items was inconsistent and often equivocal. For example, the repeated references to the speedboat been given so that the Defendant could take his family for a cruise after work could not sensibly be interpreted as any unequivocal expression by the Plaintiff of an intention for the Defendant to own the boat. That view is also fortified by the unchallenged evidence of the Plaintiff and his son of arranging and paying for repairs and spare parts for that boat, which is far more consistent with them continuing to own it rather than the Defendant. The references to the boat or any of the other items being 'his' (meaning the Defendant's) did not advance the case one way or the other.
124. Sixth, on the central issue, I accept the evidence of Meghan 'Otukolo, whom I also found to be an impressive witness. Despite her being among the youngest of the witnesses, she was very clear and careful in her recollections. Her considered distinction between the Plaintiff giving the disputed items to her father and brothers 'to use' rather than 'to own' was compelling. Her evidence was also consistent with the Defendant's original pleading in which he described the disputed items as having been given to him and his family for 'their use and enjoyment'.
125. Finally, there were a myriad of other aspects of the Defendant's case, and the evidence he gave and called, as recounted above, which I considered to be inconsistent, internally contradictory, improbable and unreliable. In addition to those already highlighted above, other examples include:
- 125.1 The Defendant's initial counterclaim for \$35,000 for the alleged cost of vanilla seedlings, \$39,000 for fig plants and \$40,000 for the alleged loss of the root crops was abandoned without explanation. The claim in respect of the vanilla seedlings was entirely contradicted by the Defendant's own evidence at trial about the seedlings (or other than the first \$200 worth) being available free of charge. Koleti's evidence in that regard was also inconsistent with Tupe's.
- 125.2 The Defendant's evidence of his initial agreement with the Plaintiff in about

October 2018 that he and his family would 'get a living out of' working on the plantation was inconsistent with his later assertion that 'a living' meant \$1 million and the vanilla, which, on the Defendant's own evidence, was only allegedly raised in 2019.

125.3 Koleti's complaints about the \$500 each week for operating expenses never being enough was entirely unsupported by her husband's evidence.

125.4 The complaints by the Defendant and his wife and other disparaging remarks about the Plaintiff and the quality of the other gifts reflected poorly on them and portray them as being ungrateful and opportunistic.

125.5 The Defendant's evidence about the extent to which he was able to harvest the root crops was also inconsistent with that of Koleti and Bryan.

Result

126. For those reasons, I find that the Plaintiff has established his case on liability.

127. I declare therefore that the disputed items are the property of, and belong to, the Plaintiff.

128. I order that the Defendant return the disputed items (or any of them which have not already been returned or placed in the Plaintiff's safekeeping) to the Plaintiff within 14 days of the date hereof.

129. I will hear from the parties on directions for the quantum phase in respect of any residual claim for damages for any disputed items which are not returned to the Plaintiff in accordance with the foregoing order.

130. I will also hear from the parties in relation to the costs of the liability phase, bearing in mind that the costs thrown away by reason of the amendments to the defence and the adjournment of the trial on 25 August 2021 have already been ordered against the Defendant.

NUKU'ALOFA
24 August 2022



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE