

Solicitor General
Civil Judgments file
AK
02/04/12

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

CV 183 of 2008

BETWEEN: 'ISIKELI KALOKALO - Plaintiff

AND : MA'AKE FAKA'OSIFOLAU - First Defendant
MARK SHIPPING LIMITED - Second Defendant

AND : PACIFIC FORUM LINE LIMITED - Third Party

BEFORE THE LORD CHIEF JUSTICE SCOTT

'O. Pouono for the Plaintiff
T. Fakahua for the Defendants
R. Stephenson for the Third Party

DECISION

- [1] This is a challenge to the jurisdiction of the Court brought by a Third Party pursuant to the provisions of Order 7 rule 2 of the Supreme Court Rules.
- [2] The writ and statement of claim were issued on 19 December 2008. The Plaintiff claims that he engaged the services of the Defendants to ship a container of cassava to New Zealand in December 2007. The Plaintiff alleges that owing to the Defendants' negligent failure to pay

the actual shippers, the Third Party, it suffered loss and damage amounting altogether to TOP\$83,000.00.

- [3] A defence filled by the Defendants denied fault but attributed any loss to negligence on the part of the Third Party (which was not, as yet, a party to the action).
- [4] On 5 November 2010 leave was granted to the Defendants to issue a third party notice and the same was filed on 28 August 2011. The Defendants pleaded that it was the Third Party's negligence which caused the losses complained of and, in the alternative, that on 22 December 2008 the Plaintiff and the Third Party had concluded an agreement to release the Third Party from any claim by the Plaintiff arising from the shipment.
- [5] The notice of challenge to the jurisdiction was filed on 19 September 2011. The notice referred to the terms of the bill of lading issued by the Third Party and was supported by an affidavit of Suzanne Gardiner sworn on 19 September 2011. A copy of the bill of lading, booking reference 2908, number TPFL03113 consigning one container of cassava from Nuku'alofa to Auckland was exhibited to the affidavit. Paragraph 27 of the terms and conditions of the bill of lading reads as follows:

"Law and Jurisdiction

Any claim or dispute arising under the Bill of Lading shall be determined by the courts of the country where the Carrier has its principal place of business and according to the law of those

Courts, or, at the option of the Merchant, by the New Zealand courts according to New Zealand law.”

[6] According to paragraph 6 of the affidavit:

“The principal place of business of both Pacific Forum Line Limited and Pacific Forum Line (NZ) Limited is Level 6, Customs Street, Auckland, New Zealand”.

[7] Subsequently, a second affidavit was filed in support of the Third Party’s application. Derek Leonard exhibited as Exhibit A a form of release addressed to the Third Party and signed by the Plaintiff in which the Plaintiff “Irrevocably release[d]” the Third Party from

“any and all claims and/or liabilities of whatsoever nature in any way arising from or related to bill of lading #TPL03113”.

[8] In his submissions filed in answer, Mr Fakahua suggested first, that by filing the application, the Third Party had, by reason of the provisions of Order 7 rule 1, submitted to the jurisdiction. With respect, this submission overlooks O.7 r 6 which specifically exempts an application brought under O7 r 2.

[9] Secondly, Mr Fakahua suggested that the form of release estopped the Plaintiff from proceeding against the Defendants. I do not agree. In my view there is nothing in the release to prevent a claim by the Plaintiff against the Defendants who were not party to the agreement.

[10] In my view the Third Party’s application, effectively to be dismissed from this action, must succeed. It is well established that the parties

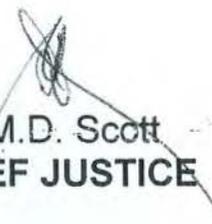
to a contract may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them and the law which is applicable to such disputes (see generally, Rule 34 *Dicey & Morris Conflict of Laws* 11th Edn).

[11] I am satisfied, on the evidence before me, that the forum for the resolution of the dispute between the Defendants and the Third Party is the New Zealand court which has jurisdiction to entertain the action.

[12] The application succeeds and the Third Party is dismissed from the suit. I will hear counsel as to costs.

DATED: 16 March 2012.




M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
8/3/2012