IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **CV 17 of 2010**

BETWEEN : **MOAPA ENTERPRISES LIMITED (t/a J.M. STORES)**

- **Plaintiff**

AND : **GLOBAL INSURANCE LIMITED**

- **Defendant**

Lord D. Tupou for the Plaintiff

W. Edwards for the Defendant

JUDGMENT

[1] This case perfectly illustrates the need for prompt and complete discovery and inspection of admissible documents and the advantage of delivering copies of the same to the Court well before the commencement of the trial.

[2] The writ and statement of claim were issued on 25 January 2010. The Plaintiff operates a supermarket at Maileteha and keeps warehouse stock in container at 'Anana. It was pleaded that the Plaintiff was covered by a Business Package Insurance Policy CP 110717 issued by the Defendant.

[3] According to the Statement of Claim the supermarket was broken into on three occasions in 2006 while containers were broken into at 'Anana on one occasion each in 2006 and 2007. Particulars of the losses sustained were given in paragraphs 6(i) to 6(v) of the Statement of Claim.

[4] The Plaintiff's claim is for T$46,071 plus interest, which sum is said to represent the total value of the goods lost as a result of the break-ins, and which the Defendant, despite individual claims being lodged, has refused to pay.

[5] In its Statement of Defence filed on 23 February 2010 the Defendant admitted that it was the Plaintiff's insurer. It however put the Plaintiff to strict proof of each of the individual claims. It also relied on two exclusion clauses, a T$10,000 limitation of liability clause and a T$1000 excess clause in the policy.

[6] On 12 May the Defendant filed a list of documents in its possession and on 18 May the Plaintiff filed its own list. On 1 July the matter was set for trial on 23 November. On 18 November copies of documents in its possession were filed by the Defendant.

[7] On the morning of the trial the court pointed out that Documents D17, 18, 19 and 20 entitled "Release Form" appeared to record compromises of four of the five claims agreed between the parties on 20 November 2007. After discussion an adjournment was granted to allow the parties to make the very substantial amendments to their pleadings which were incorporated into the Amended Statement of

Claim and the Amended Statement of Defence which were both filed on the same day.

[8] In its amended pleading the Plaintiff accepted that a limit of T$10,000 applied to each claim and having recalculated the total amount, claimed T$37,361.00 under the policy. In the *alternative* however it claimed T$27,117.20 which was the amount agreed between the parties when the claim was compromised in November 2007.

[9] The amended Statement of Defence repeats the original defence. It also accepts that the four release forms were executed by the parties and, specifically "were prepared by the Defendant for the amounts set out therein". The Defendant accepts that nothing has been paid to the Plaintiff in respect of its claim or following the compromise. The Defendant however pleads that :

> "after the forms were completed facts and circumstances were discovered by the Defendant when the claims filed for and on behalf of the Plaintiff were materially false, that there were misrepresentations made in respect of each of the claims pleaded herein, that the Plaintiff failed to disclose material facts in respect of each of its claims, that the Plaintiff failed to act in honesty and good faith whereby the Defendant was entitled to deny all the claims and cancel the policy of insurance".

No particulars of the Plaintiff's alleged failures were given by the Defendant and neither were any particulars given of the date when these alleged failures were identified, or by whom, or when, or indeed whether, the policy was actually cancelled.

[10] Before turning to the evidence it is necessary briefly to consider the law of compromise. A compromise is said to occur when a claim which is asserted by one party is disputed by the other but after discussion, the parties agree to compromise the dispute, or settle the claim, on terms which are mutually agreed. If the agreement is complete and certain in its terms and consideration has been given or promised in return for the promised or actual forbearance to pursue the claim then it will amount to a binding contract. In the usual case where the claimant agrees to accept the other party's promise of performance in satisfaction of his claim, the original claim is discharged from the date of the agreement and cannot be revived. In the event that the other party fails to perform, the only option is to sue for breach of the substituted agreement; there is no right to resort to the original claim (*British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, 644-645).

[11] Once a valid compromise has been reached, it is not open to the party against whom the claim was made to avoid the compromise on the ground that the claim was in fact invalid, providing that the claim was made in good faith and was reasonably believed to be valid by the party asserting it. While a settlement based on fraud will obviously be set aside as will one in which the claimant knew full well that his claim was bad in law, where both parties knowingly take the risk that the facts might turn out to be different from the facts as they were alleged or supposed to be, the compromise will be upheld. As stated in *Chitty on Contracts* 29th Edn 3-054 :

> "A negotiation of a settlement on disputed facts always takes such an element of risk into account".

[12] Applying these principles to the present case, it seems clear that the consequence for the Plaintiff of asserting (albeit in the alternative) the validity of the compromise reached in November 2007 must be the acceptance that the original claim has been discharged and cannot be revived. The consequence for the Defendant is that failing proof, on the balance of probabilities, that the compromise was invalid in law or obtained by fraud or mistake, it will be upheld unless there is a further reason, in agency for example, for it not to be binding.

[13] All four releases D71, 72, 73 and 74 are in the same from. They record that in consideration of payment of the agreed sum by the Defendant, the Plaintiff agrees to release the Defendant "from any liability for damages, costs, charges and expenses which it may have now or in the future in respect of the property (or in any way relating to the property)". Unless the Defendant can show that there was no bona fide belief in the claim, the compromise is supported by valuable consideration (*Longridge v Dorville* (1821) 5 B & Ald 117).

[14] The Plaintiff's managing director is Rudra Prasad who was the third witness called. He told me that in 2006 and 2007 he was based in Fiji and was told by one or other of his staff in Tonga that the burglaries had occurred. He gave instructions that they were to be reported to the police and that insurance claims were to be prepared. In November 2007, the claims not having been met, he telephoned Stuart Twaddle "who was the Manager of Defendant Company at the time". This conversation was followed by a meeting between the two men in Tonga when the Plaintiff's claims were discussed: "we agreed on the amounts and I signed the release forms, Twaddle witnessed my

signature". "I called the Defendant on my next trip. I was told there was a new manager. He told me that they were still processing the claims and would come back to me. They never did."

[15] The first witness called by the Defendant was Mr Twaddle who confirmed that Mr Prasad came to see him in November 2007 : "We had a lengthy talk about if for half or three quarters of an hour. We went over each claim individually in detail. I signed the releases … we released all four claims on the same day. We went over each claim individually. Mr Prasad agreed to settle for less - T$10,000 limit for burglary less the T$1000 excess … My concern was that the claim is legitimate even if there was a sub-limit. If I had information that the claim was inflated I would have reported it to the police. If I had suspected that was the case I would formally have declined in writing, that is what the insurer must do." Later he told me " "We did not really have full information on any of the claims but I was prepared to settle. Mr Prasad put some pressure on me. I wanted them settled for the company and myself as there was an amalgamation with Dominion coming up. I wanted all claims with Global settled as soon as possible".

[16] In cross-examination Mr Twaddle was asked about his authority to settle the claims. He stated first, that he had authority to settle but later he stated that his authority had ceased in August 2007. He agreed that no revocation of authority was published and that he had nothing in writing. He agreed that he had passed the settled claims to the Defendant's directors for payment. He also agreed that the claims was not passed to the directors for payment subject to satisfactory police reports : "The board had the police reports before them." Earlier

he had told me : “I put [the claims] through for payment to a board member. They heard something later that made them decide not to pay.”

[17] Having heard Mr Prasad and Mr Twaddle and having looked at the release forms and considered their wording I am satisfied that the Plaintiff lodged these claims, that they were settled following negotiation and that they were unconditionally passed to the Defendant’s board for payment. I am satisfied that Mr Twaddle had apparent authority to settle these claims and, notwithstanding his late equivocation, that he had actual authority to settle the claims in November 2007. It will be in particular be noted that the agreements reached, as recorded in the documents, make no mention of the agreement bring subject to confirmation by the board or subject to satisfactory police reports. The releases were signed by the Twaddle above the printed word “Authority”.

[18] The remaining question is whether the Defendant has established that the claims were made *mala fide* or fraudulently. In an attempt to answer this question the Defendant called two witnesses.

[19] Tevita Tu’ipulotu told me that he handled claims for the Defendant in 2008 and 2009. He told me he reviewed the Plaintiff’s claims and reached the conclusion that they should be rejected, “some of them”. “What I was told by Katie affected me. According to her, the amounts were wrong”. He told me that he decided that the claims should be rejected in 2008 but it was not until 2009 that he spoke to Katie. This was after Mr Twaddle “had left”. This witness also referred me to document D60. This appears to be a statement of loss prepared by

the Plaintiff in relation to the August 2006 loss of chicken leg quarters (paragraph 6 (iv) of the Statement of Claim and release form D73). It is signed by Rohit Raj the Plaintiff's then store manager and by "Kaite" as Warehouse Operation Manager. It states that 398 cartons had been stolen. Across the original have been written the words "this stock take should be one of Global claims staff will be there to confirm this stock take". These words are signed but by whom, I was not told. Underneath the words are further words "12 ctn lost". I was not told by whom, where, when or in what circumstances any of these words were written.

[20] The name "Kaite" evidently refers to Keiti Hafoka who was the third witness called by the Defendant. This witness told me that until some time in 2006 she worked for the Plaintiff. She was responsible for stocktaking at 'Anana. In August 2006 she discovered that the lock on one of the containers had been damaged. Inspection revealed that some boxes of chicken leg quarters were missing : "I could not confirm what was taken." She remembered talking to Tevita Tu'ipulotu and telling him she did not believe that 398 boxes had been stolen. She thought no more than 100 cartons had been taken. She was not asked about the words "12 ctn lost". She told me that she had placed her signature on D60 "without knowing whether it was right or wrong".

[21] In my view the evidence led on this issue by the Defendant fell far short of establishing that the claims lodged by the Plaintiff and compromised in November 2007 were not made in good faith.

[22] For the reasons given in paragraph [10] the Plaintiff's claim in the first alternative must fail. There will however be judgment for the Plaintiff

on the second alternative claim. The judgment will bear interest at the rate of 10% from 27 November 2011 until satisfaction of this judgment. I will hear counsel as to costs.

M.D. Scott

DATED: 13 January 2012. **CHIEF JUSTICE**

N. Tu'uholoaki
9/1/2012