

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

Solicitor General.
One
Civil judgment file.
AK 19/07/12

CV 422 of 2007

BETWEEN: 'ETUATE SUNGALU LAVULAVU - Plaintiff

AND : LOOK SHARP (TONGA) LIMITED - First Defendant

: SIONE TUALAU LATU - Second Defendant

Plaintiff in person

Corbett for the First Defendant

Tu'utafaiva for the Second Defendant

JUDGMENT

1. On 3 March 2006 the Plaintiff and the Second Defendant signed a "Deed of Agreement" between them. The document (Exhibit P4 & P5) was drafted by a lawyer who, together with a Mr. 'A. Kuma, also signed it.
2. On the same day an "Agreement" (Exhibit P5 & P6) was also prepared by the same lawyer. It recorded an agreement reached between the First and Second Defendants and in addition to being signed by them was also signed by the Plaintiff and the lawyer.
3. It is not disputed that the effect of the two documents taken together was:
 - (a) For a previous agreement between the Plaintiff and the Second Defendant in respect of sub-lease 3560 to be cancelled.

- (b) That any claim that the Plaintiff might have had against the Second Defendant arising from the cancellation was foregone;
 - (c) That the Second Defendant agreed to transfer sub-lease 3560 to the First Defendant; and
 - (d) That the First Defendant agreed to pay a total of \$80,000 for the transfer of the sub-lease to it.
4. The issues in this case are whether:
 - (a) The agreements are legally binding;
 - (b) They provide for payment by the First Defendant to the Plaintiff of any sum; and
 - (c) If so, what sum.
 5. The three witnesses who gave evidence were the Plaintiff, Mr. Alofatana Kuma (The First Defendant's managing director) and the Second Defendant.
 6. The Plaintiff and the Second Defendant became business associates in about 2005 and the deterioration of that relationship and previous litigation thereby generated coloured much of the evidence that they gave. In my view, however, it is not necessary to revisit that evidence in any detail in order to resolve the issues before the court.
 7. Document P18 produced by the Plaintiff was a copy of an agreement between the Plaintiff and Second Defendant dated 27 December 2005 relating to the operation of the Nawai Ali'i Beach Resort. Principally, the agreement provided that the Second Defendant would provide the land and improvements for the resort while the Plaintiff would provide the management. It is not disputed that at about this time the Plaintiff moved into the resort and began performing management functions.
 8. It is not in dispute that on 4 January 2006 the Plaintiff, with the Second Defendant's agreement, applied to the Minister of Lands for the transfer to him of the Second Defendant's sub-lease 3560 on which the resort was located. According to the Plaintiff, the transfer agreed with the Second Defendant was to secure the investment which the Plaintiff had made in the resort. According to the Second Defendant, he was in severe financial difficulty and the Plaintiff assured him that the proposed arrangement would allow additional funds to be raised.
 9. Mr. Kuma told me that in about February 2006 he saw an advertisement for the lease of the same piece of land. He contacted the Second Defendant and they agreed that the Second Defendant

would transfer the sub-lease to the First Defendant which wished to expand its business at Vava'u.

10. The Second Defendant told me that after he had agreed to the transfer of the sub-lease to the Plaintiff he changed his mind. Although the application P18 was lodged with the Land Office it was never processed to completion after he went to the Land Office and told them to cancel the application. The Second Defendant explained that during March and April 2006 he became suspicious of the Plaintiff and their working relationship deteriorated. He decided not to proceed with the transfer.
11. The Second Defendant told me that after he had met Mr. Kuma and agreed to transfer the sub-lease to the First Defendant, instead of the Plaintiff, the parties met at the lawyer's office where the two agreements were signed. The Second Defendant did not dispute that the agreements had been signed but explained that he signed the agreements as drafted, not because he had any intention that the Plaintiff should receive any part of the agreed sum of \$80, 000 but because he was anxious not to lose the opportunity of earning the \$80, 000 by transferring the sub-lease to the First Defendant.
12. The Second Defendant explained that in his view the Plaintiff had not complied with the terms of agreement reached between them in December 2005, that he had not invested in the resort as required and that he did not owe the Plaintiff anything. He was anxious to have the agreement with the First Defendant but it was not his intention that the First Defendant should pay any part of the \$80,000 to the Plaintiff.
13. The first 3 March agreement provides in paragraph 3 that

"The payment due...for the sub-lease [to] Look Sharp Tonga Ltd shall be paid to Sione Tualau Latu and 'Etuete Sungalu Lavulavu."

The second 3 March agreement provides in paragraph 4:

"Look Sharp (Tonga) Ltd agree to pay \$80,000 to Sione Taulau Latu regarding this sub-lease in the manner provided for hereunder as follows:

- (i) To pay T\$50,000 after Cabinet approval of the sub-lease of Look Sharp Tonga Ltd to Sione Tualau Latu and 'Etuata Sungalu Lavulavu.
 - (ii) The balance of T\$30,000 to be paid out to Sione Tualau Latu and 'Etuata Sungalu Lavulavu after three years unless the company has the chance to pay before hand."
14. It is accepted that the sum of T\$50,000 was paid on or about 3 March by the First Defendant however the whole of that sum was paid to the Second Defendant. The Plaintiff's case is that he is owed T\$40,000 (T\$10,000 by the Second Defendant and T\$30,000 by the First Defendant). The Second Defendant's case is that neither he nor the First Defendant owe the Plaintiff anything. The First Defendant's case is that while it accepts that T\$30,000 is still due under the agreement, it does not know whom, or in what proportions, to pay.
15. In my opinion there is no ambiguity in the March 3 agreements. As I see it, their clear purpose was to relieve the Second Defendant of any cause of action that the Plaintiff might have against him and, in consideration of obtaining such relief, the Second Defendant agreed that the Plaintiff would have one half of the proceeds of the transfer of the sub-lease to the First Defendant. For its part, the First Defendant agreed to pay one half of the transfer price to each of the Plaintiff and the Second Defendant.
16. The next question is whether the agreements were legally binding. The Second Defendant, as has already been seen, suggested that they did not represent his intentions and that he only signed because he needed the money. Mr. Tu'utafaiva in his written submissions filed on 6 October suggested that there was no consideration from the Plaintiff.
17. As stated in *Phipson on Evidence*:
- "When a transaction has been reduced to or recorded in writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict vary, add to or subtract from the terms of the document."
- "The grounds for exclusion commonly given are...that when the parties have deliberately put their agreement into writing it is conclusively presumed...that they intend the writing to form a

full and final statement of their intentions and one which should be placed beyond the reach of further controversy, bad faith or treacherous memory.”

(14th Edn. para5. 37-11, 37-12).

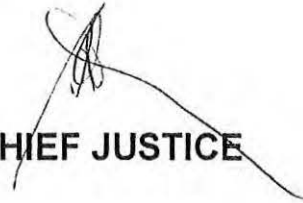
18. This common law rule is complemented by section 79 of our own Evidence Act (Cap 15) to which Mr. Tu'utafaiva referred in his written submissions. He suggested that there was specific provision in section 79 for evidence to be given that there was no consideration for the agreement reached. I agree with Mr. Tu'utafaiva that the Act so provides but I do not accept that any want of consideration has in this case been shown.
19. The Second Defendant's evidence included the suggestion that he owed nothing to the Plaintiff for it was the Plaintiff who had not performed his part of the December 2005 bargain. Whether or not that was the case (and in my view the Second Defendant's evidence was far short of establishing, on the balance of probabilities, that it was) it cannot be doubted that the Plaintiff and the Second Defendant had reached an agreement for the Second Defendant to transfer his sub-lease to the Plaintiff. In my opinion the agreement to cancel that agreement and to forego any right of action in respect of the cancellation provided valuable consideration by the Plaintiff to the Second Defendant (see *Chitty on Contracts* 29th Edn para 3-047).
20. Mr. Tu'utafaiva also suggested that since the Plaintiffs claim, as pleaded in paragraph 1 of his Statement of Claim, to have been the holder of the sub-lease, was now known not ever to have been the case, his action must fail. I do not agree; in my view this was merely a drafting error: it is plain from the whole of the Statement of Claim that it is the 3 March agreements which are being relied on. Those agreements leave no doubt that the Plaintiff never received the transfer of the sub-lease to him which the Second Defendant had promised.
21. Mr. Corbett, for the First Defendant, in a learned written submission, suggested that the 3 March agreements were ambiguous. With respect, I do not agree and neither am I satisfied that there was any good reason why the balance of T\$30,000 owed could not have been paid into court.
22. There will be judgment for the Plaintiff against the Defendants. The First Defendant is ordered to pay the Plaintiff T\$30,000 forthwith. The

Second Defendant is ordered to pay the Plaintiff T\$10,000 forthwith. I will hear counsel as to costs.

22 December 2011

E. Takataka




CHIEF JUSTICE