

Judgment file

A
16/10/09

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

CV 109 of 2009

BETWEEN: ECO-FRIENDZ LIMITED - Plaintiff

AND : ISLAND BEVERAGE LIMITED - Defendant

BEFORE THE HON. JUSTICE SALMON

**Counsel : Mr Stephenson for the plaintiff and
Mr Corbett for the defendant**

Date of Hearing : 5 October 2009.

Date of Judgment : 9 October 2009.

J U D G M E N T

[1] This is an application for summary judgment. The application is opposed by the defendant who says there is a defence to the claim.

[2] The claim pleads a contract between the parties for the purchase of liquor. The original contract was for the purchase by the plaintiff from the defendant of 1500 cartons of Heineken beer for a total sum of

NZ\$37,125.00. The plaintiff claims and the defendant accepts that this sum was paid to the defendant in December 2008.

[3] The contract was later varied to provide for the supply of different brands and quantities of liquor of a total value of NZ\$41,736.00. It is agreed that in January 2009 the plaintiff paid the defendant a further sum of \$4,611.00 to make up the difference in purchase price.

[4] That plaintiff claims and the defendant accepts that no product has been delivered to the plaintiff. As a consequence the plaintiff claims specific performance of the contract or in the alternative repayment of the amount paid together with interest and an amount for lost profits.

[5] In its Statement of Defence the defendant claims that there was a previous deal with the plaintiff which involved the services of a customs clearance agent with a New Zealand export license. The Agent charged a commission for his services. The defendant alleges in relation to the present transaction that the plaintiff tried to persuade its director Tanusia Paea to act as agent to avoid commission fees. Mr Paea explained that the defendant does not have an export license and cannot clear the goods for export. The plaintiff's case is that it did not wish to export the goods but rather to sell them in New Zealand. In his affidavit in opposition to summary judgment Mr Paea says that the plaintiff knew that the defendant could only purchase goods for export but in fact wanted the goods to remain in New Zealand for sale. Apparently goods purchased for export can be obtained for a lesser price than those purchased for sale in New Zealand and the arrangement was to ensure a greater profit for the plaintiff. In fact counsel for the defendant argued that the transaction was illegal.

[6] The plaintiff denies illegality and claims this is a straight forward agreement for the supply of goods and if the defendant has to send them to Tonga and then back to New Zealand that is not the concern of the plaintiff.

[7] The defendant's affidavit raises the possibility that the arrangements between the parties did involve an illegal transaction using an export agent when the real intention was that the goods should remain in New Zealand. At least there is sufficient evidence to justify the matter going to trial so that the conflicting evidence can be tested and the court can properly determine whether, as counsel for the defendant claims, the contract was illegal.

[8] Accordingly the application for summary judgment is declined. The proceedings are set down for a directions conference at 9am on Friday 16th October. Costs are reserved.

[Handwritten initials]
DATED: 5 October 2009.



[Handwritten signature]

JUDGE