Solicitor General

file

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

NO.C.304/93.

BETWEEN : RAMANLAL AND SONS LIMITED - Plaintiff;

AND : TETA TOURS LIMITED - Defendant.

Mr S. Tu'utafaiva	:	for the Plaintiff.
Mr S. Lemoto	:	for the Defendant.
Date of Hearing	:	26 & 27 October, 1998.
Date of Judgment	:	28 October, 1998.

Reasons for Judgment

On 26 & 27 October 1998 I heard evidence from witnesses called by both parties on the issue of whether these proceedings had been settled on 13 September 1995. I heard excellent, brief and well-directed submissions by two competent counsel, Mr Tu'utafaiva and Mr Lemoto.

At the end of the hearing on 27 October, I ruled that there had been no settlement, because the parties had not ever been ad idem on the terms of the settlement. I said that I would state my reasons in writing later. In the meantime, this action must either be settled or must proceed to hearing, because it is crying out for an ending. The two chief witnesses for the parties had correctly said so on 13 September 1995 to each other. Regrettably the attempt to settle it on and since that day came to nothing.

I also ruled that the defendant cannot now rely, as it wishes to, on a purported undertaking by counsel for the plaintiff to accept judgment in favour of the defendant, given in a letter dated 8 August, 1994. This is for the reason that the court has already ruled to that express effect in the ruling of Lewis J dated 22 August 1996.

I directed that these proceedings should now be settled if possible, or otherwise brought to an early hearing, so that the parties can be freed of this litigation. The later proceedings are no more than a fresh litigation of the original counter-claim in the present action, with updated and agreed amounts. Those proceedings must await the outcome of the prior proceedings. Those agreed amounts were calculated during the attempt to settle the present action, and after the court had adjourned the hearing on 13 September 1995. It is clear that if there is to be litigation then, as a result of those agreed amounts, there

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will need to be amendments to the pleadings in the present action. It will then be the burden of each party to prove to the court all the legal and factual elements of the claim and the counter-claim. For that purpose, I told counsel that it will not be necessary to produce again the evidence given on 26 & 27 October 1998. Whether any of those witnesses will be required to prove further facts in the substantive claim and counter-claim is for counsel to decide.

I was asked a question about the status of the "Hawaiian Airlines debt", which was a feature of the hearing. I record here and expand my response, which is that the court can decide only the claims put before it in the pleadings. The parties may however, if they wish, simply state to the court that the liability for that debt as the only issue between them, and ask the court for a ruling on liability, without any further amendments and without any unnecessary delay. All that will be needed is time to muster any necessary evidence to support claims of legal and factual relationships, and claimed amounts, and to prepare submissions about the resultant liability. If the court can serve the parties it wishes to do so with absolutely minimal delay, given that it was on 31 March 1994 that the first of the four Judges of this court who have heard the parties wrote on the file, "Case continued to 16/05/94 for settlement, when case will be disposed of one way or another". Nor was he the last of the four to note that a particular adjournment would be final. I confirm that I shall see counsel in chambers next Friday 30 October. On that day this action will be given its last final hearing date. After that it will be either settled, adjudicated or dismissed.

I now state my reasons for finding that there was no settlement of the action on or since 13 September 1995. The primary finding which I made from the evidence is that the parties were never ad idem. It is clear that they had a will to settle, and it was agreed between them that they would calculate what was owed by each to the other, then whichever party owed more would pay the difference to the other. Two accountants were appointed, one by each, to calculate the amounts. The amounts were calculated. Among the amounts calculated was the amount which the accountants agreed is owed to the plaintiff for services rendered to Hawaiian Airlines. This amount, according to the clear momentum of the evidence, was never accepted by the defendant as a debt for which it was liable to the plaintiff.

Mr Niu's account of the negotiations started, faithfully I find, by recounting his suggestion that if the Hawaiian Airlines debt could be included, the parties could settle everything with a payment of (T$20,000 – T$17,000 = T$3000) by the plaintiff. This suggestion, I find from the evidence of Mr Na'a Lemoto, was rejected by the defendant. Mr Niu in evidence did not say that Mr Lemoto had rejected it. What he said was that his proposal was accepted, but that Mr Vaipulu had said he could not agree with the T$17,000 claimed by the plaintiff for the Hawaiian Airlines debt, he would rather the accounts of Hawaiian Airlines be reconciled by the accountants before it was accepted. The parties then went on to appoint the accountants to calculate the amounts. Even on this evidence I am inclined to think that they had not agreed to include the Hawaiian Airlines amount, because of Mr Vaipulu's stipulation that the amount be calculated by the accountants before it was accepted. However, there is other evidence. Both

Mr Ramanlal for the plaintiff and the Teta accountant Mr Mapa agreed that the purpose of the calculations by the accountants was to discover "who owes whom". That was a calculation of amounts. Without clear acceptance by the defendant that it owed, or would pay, the Hawaiian Airlines liability, there was a clear issue about the defendant's liability that had been raised by the defendant in the settlement negotiations, which could not be settled by the accountants. Mr Vaipulu for his part said he stipulated at the outset that the Hawaiian Airlines debt would not be accepted by the defendant.

It was never agreed between them at any time, I find, that the Hawaiian Airlines amount, once calculated, would become a debt due to the plaintiff payable by the defendant. The plaintiff had two agents, including its lawyer Mr Niu, travel to Hawaii for several days in order to locate evidence that the money owed by Hawaiian Airlines to the plaintiff had been paid to the defendant. The plaintiff then obtained from the court, properly in my view, an order for discovery in order to obtain evidence of those suspected payments to the defendant. The plaintiff by its actions, if not in its mind, was acting consistently with facts which seem clear to me. These are (i) the plaintiff acknowledged that it should look to Hawaiian Airlines for the payment, unless the money had been paid to the defendant, and (ii) the defendant had not agreed to pay the debt that Hawaiian Airlines owed to the plaintiff.

Whether or not the litigation had been settled depends on construction of the parties' words and actions to ascertain whether a contract to settle came into existence. The evidence which I heard tends in one direction. There is not sufficient to establish on the balance of probabilities, that a fully formed and identifiable contract about payment of the Hawaiian Airlines debt by the defendant, came into existence. These are the reasons for my finding, made orally at he hearing, that this litigation is not yet settled.

Costs on this hearing will be costs on the cause.

SUPREME COURT TONGA

Dinnigan ACJ

NUKU'ALOFA, 28 October 1998

ACTING CHIEF JUSTICE