IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 36/05

BETWEEN **WILLIAM FRAMHEIN** of Rarotonga, Consultant
First Plaintiff

AND **IVA EITIARE FAIRBRASS** of Rarotonga, Consultant
Second Plaintiff

AND **TEPAKI INVESTMENTS LIMITED** a duly incorporated company having its registered office at Rarotonga
First Defendant

AND **TEPAKI PROPERTIES LIMITED** a duly incorporated company having its registered office at Rarotonga
Second Defendant

AND **TEPAKI NOOAPII (TIM) TEPAKI** of Wellington, New Zealand, Property Developer Director
Third Defendant

Mr C Little for Plaintiffs
Mr T Vakalalabure)
Mr N George) for Defendants
Mr C Petero)
Date of hearing: 18,19 June 2007
Date of decision: 20 June 2007

JUDGMENT OF WESTON J

Introduction

1. The First and Second Plaintiffs claim certain monies from the Defendants which total, after some allowances, $25,024.38. The Defendants have a counterclaim for $1600 relating to a car park.

2. Approximately ten days ago the Defendants sought to bring a fresh counterclaim for $57,651.22 plus $1.5 million dollars said to represent "general aggravated and/or punitive damages." On 12 June 2007 Paterson J stayed that new part of the counterclaim. In paragraph 9 of his decision he noted that resolution of one factual issue might determine the counterclaim in any event. This is an oblique reference to the Dell computer that I discuss below.

3. It appears there are a number of matters in dispute between the parties in addition to those before me in this proceeding. Allegations of criminal conduct had been made by the Tepaki Group against Mr Framhein. I understand they are being investigated. I cannot, and do not, reach any conclusions in relation to those other matters. I stress that my judgment is arrived at on the basis of the issues raised in the pleadings and the evidence properly before me.

4. In this judgment I will speak of the Defendants collectively for convenience, either by reference to Mr Tepaki alone or to the Tepaki Group. When it is necessary to do so, I will investigate the liability of all or any of the Defendants. Referring to the Defendants collectively reflects the reality that Mr Tepaki is clearly the leader and decision-maker in that organization. In a real sense, as well as at law, he is the alter ego of the Defendant companies. The Defence, in closing, would have me regard the companies as entirely separate from Mr Tepaki but I reject that as I will discuss in more detail below.

5. As I said yesterday at the close of submissions, this is a sad case because it is the consequence of a failed friendship. I recognize the considerable stress that that must have placed on all of the parties. It is obviously desirable that I issue this decision as soon as possible. I

had reached a clear view and will endeavour to express it as fully and clearly as I can in the circumstances.

Pleadings

6. The Plaintiffs' case is set out in the second Amended Statement of Claim dated 11 May 2007. Two amendments were made to paragraphs 8 and 11 of that pleading. The essential claim is for wages alleged to be owing pursuant to an employment contract calculated at $800 per week for a period commencing late 2004 and ending 2 September 2005; the total is $29,600.

7. To be added to that claim are two sums that I understand are not in dispute, first, $3,263.22, and a second sum of $287.44.

8. From the sum of the above described amounts $5714.94 is to be subtracted representing payments made to the Plaintiffs and detailed in a two page reconciliation they spoke to in evidence. This sets out the payments they acknowledge were received by them in the period February to August 2005.

9. The Defendants criticized Mr Framhein in relation to these payments, and possibly in relation to others, and I return to this shortly. The sum of $5714.94 was pleaded in the Statement of Claim although the wrong amount was inserted and was one of the two amendments made. That pleading was admitted in paragraph 8 of the Amended Statement of Defence. If criticism was to be made of those payments, that at least was one place where I would have expected to see it. However, there was no such criticism, only an admission that the payments were in fact made.

10. The Plaintiffs bring their claim "in contract and tort." I observe that the counterclaim in the Amended Statement of Defence uses the same formula. The Statement of Claim incorporates a claim for breach of an oral employment contract which is the primary claim. It is not so immediately obvious that it also incorporates a quantum meruit claim although that may be arguable. However, I do not believe I need to resolve the issue of quantum meruit because it seems to me that this is a claim properly considered in contract.

11. The Plaintiffs' claim treats the two Plaintiffs jointly and they sue the three Defendants jointly as well. The Amended Statement of Defence at paragraphs 4 and 5 appears to accept:

(a) there was an employment contract;
(b) the employer comprised the three Defendants;
(c) the two Plaintiffs were jointly employed;
(d) wages were to be $800 but reducing to $300 when the Plaintiffs' apartment was rented.

12. In closing, counsel for the Defendants accepted that the above summary was a proper reading of the pleadings and that the Defence accepted there was an employment contract at $300 per week but not at $800 per week once the apartment was rented.

13. In paragraph 4 of the Amended Statement of Defence, it is pleaded that the Plaintiffs were returning to the Cook Islands to set up a radio station. This became a consistent theme of the Defence in that the main reason for the Plaintiffs returning to the Cook Islands was said to be a desire to set up a radio station. In that context it was said that their working for the Tepaki Group was a reasonably low-key, short term matter. I note that Mr Framhein accepted that he was hoping to

set up a radio station when he returned to the Cook Islands in late 2004 but that he did not achieve this goal until approximately four weeks ago when the station started broadcasting.

14. In the Amended Statement of Defence originally there were three counterclaims but only one was pursued at the hearing and that was in relation to the car park. It was alleged that the car park owned by the Tepaki Group was rented to the Plaintiffs at $50.00 a week for a period of 32 weeks, thus making a total claim of $1600. These allegations are set out in paragraphs 1 and 2 of the counterclaim. The balance of that document was stayed by the order of Paterson J discussed above.

Allegations of dishonesty against Mr Framhein

15. Despite the absence of any basis for it in the pleadings, Mr Framhein faced a barrage of allegations and insinuations of dishonesty. Mr Little properly objected to such evidence. That evidence was first seen in the cross examination of Mr Framhein. It was then expanded upon in a statement from Mrs Tepaki and in the evidence of the Detective Senior Sergeant.

16. The allegations and insinuations were somewhat imprecise and it appeared to me changed focus from time to time. I discerned at least three types of allegation:

(a) that Mr Framhein wrote Tepaki Group cheques for the benefit of him or the Second Plaintiff personally;

(b) that Mr Framhein signed cheques as sole signatory rather than obtaining a second signature;

(c) that Mr Framhein wrongly took the Dell computer.

17. I allowed the evidence to be given de bene esse. At the time the evidence first arose, and Mr Little objected, I made a ruling. I said I could not properly determine the scope and relevance of the evidence at that stage but doubted that it would be admissible. Those initial concerns have now crystalised. Such evidence is not admissible.

18. But even if I am in wrong as to that, and it is taken into account, there is no basis established in the evidence that justifies the making of the allegations and insinuations of dishonesty. Simply signing cheques with one signature rather than two is not per se dishonest because it is a question of authority and that was not fully addressed before me, let alone pleaded. I note that the Bank accepted the cheques and honoured them. There were veiled criticisms made of the Bank but I am not prepared to accept that the Bank was at fault. There was no evidence. I simply do not know.

19. Despite criticisms that Mr Framhein used monies for his personal benefit and/or for the personal benefit of the Second Plaintiff I note that on at least one occasion Mr Tepaki said that the Plaintiffs were entitled to "free board" so it is obvious to me that the question of authority is an important one that may need to be addressed on another day.

20. It was, I think, ironic that while Mr Framhein was criticized for making these payments, some to himself, he was also criticized for failing to take further payments of $300 per week from the relevant company accounts. In any event, I do not believe it is an answer to the present claim to say that funds were available and that Mr Framhein should have helped himself but did not.

21. For the reason set out above, I take no account of the allegations and insinuations of dishonesty and proceed on the basis that $5714.94 properly represents the payments to be set-off on account.

Witnesses and Credibility

22. I heard evidence from five witnesses: the two Plaintiffs, Mr Tepaki, Detective Senior Sergeant Battaillard and Mr Beddoes. I received two statements from Mrs Tepaki.

23. Mrs Tepaki, although requested to attend for cross examination, did not appear. Counsel advised me that was because she is attending to her brother who is very sick in New Zealand. Counsel accept that in those circumstances the weight to be given to her evidence is a matter to be assessed by me. So far as her evidence relates to disputed matters, particularly in relation to credibility, I can give it little weight. I also note that Mrs Eitiare gave important evidence as to statements made to her on a number of occasions by Mrs Tepaki, for example I refer to paragraph 27 of her statement, which are uncontroverted because Mrs Tepaki was not able to be present.

24. I want to say something in particular about the second of the two statements tendered by Mrs Tepaki. I assume that this was prepared on advice. Subject to that acknowledgement, in my view it was an entirely inappropriate document. It made unsubstantiated allegations on the basis of hearsay and speculation. I give it no weight whatsoever.

25. Issues of credibility do arise and I cannot see that I can avoid them. That requires me to set out my assessment and impression of the relevant witnesses and my assessment also of other materials in order

to determine such credibility disputes. I start that assessment by looking at the second Plaintiff. I am satisfied that she gave her evidence honestly and accurately. I am influenced in that conclusion by her diary for 2005 which was in evidence before me. As far as I could tell it was an accurate record of events in which the Second Plaintiff participated. I reject any assertion that it must have been manufactured as Mr Tepaki said. On the contrary I accept her evidence entirely.

26. I have some reservations in relation to the evidence of each of Mr Framhein and Mr Tepaki. In the case of Mr Framhein, I need to put aside the allegations and insinuations of dishonesty that I have already discussed. My reservations about the evidence of both Mr Framhein and Mr Tepaki arise as a result of the ASB letter which I will discuss shortly. It set out an inflated claim to salary entitlements. It reflects adversely on both of the two men. Other than that though, I am satisfied that Mr Framhein, who gave evidence twice because he was recalled to rebut a point in the Defence case, gave his evidence carefully and honestly. He made realistic concessions where appropriate.

27. I have more reservations in relation to the evidence of Mr Tepaki. He tended to make assertions first and then back away from them under pressure. He retreated to claims that he did not know the details despite prior assertions that he did. He was tripped up on a number of details. He denied saying that he had said to the Plaintiffs that if they returned to the Cook Islands they should work for the Tepaki Group. But when confronted with an email where he had said that, he accepted that he had. I thought that his prevarication in relation to the issue of New Zealand wage levels discussed at a meeting on 10 January 2005 was revealing.

28. I do not want Mr Tepaki to take from this that I hold an entirely negative view of him or his evidence. He is clearly a man of vision and leadership but he is not a man of detail. In some respects, he was open and candid and made proper concession. But when I am forced to assess him and Mr Framhein I arrive at a conclusion that, in cases of conflict, I prefer the evidence of Mr Framhein over that of Mr Tepaki.

Facts

29. Against that background I make the following findings.

30. By 2004 Mr Framhein was employed by Mr Tepaki's company Timco in New Zealand earning around $600 per week. Ms Eitiare was employed by the Ministry of Social Development where she had been employed for 17 years on a slightly higher income that that of Mr Framhein.

31. In March 2004 the Plaintiffs and Mr Tepaki had a discussion about the Plaintiffs' future plans. They said they were excited by development in the Cook Islands, Mr Tepaki said that if they were returning there they should work for the Tepaki Group.

32. From that time on the Plaintiffs gave financial and moral support to Mr Tepaki in relation to his Cook Islands plans. They paid monies on behalf of the Tepaki Group and made some loans. For example, they paid for eight plane tickets on their personal credit card. Mr Tepaki initially sought to characterize this as a usual practice but then conceded that it was not normal. It is common ground that all such payments had been repaid to the Plaintiffs. The relevance as I see it is

that it appears to be inconsistent with the general approach of the Defendants that the Plaintiffs were intent on ripping off the Defendants.

33. On various occasions in 2004 the Plaintiffs said they were interested in returning to the Cook Islands and Mr Tepaki continued to say that they should work for the Tepaki Group when they did. This is confirmed in an email sent by Mr Tepaki in September 2005.

34. There was a discussion on 29 September 2004 between Mr and Mrs Tepaki and the Plaintiffs. It was an important discussion because following it Ms Eitiare gave notice to her New Zealand employer. That was on the 1st of October 2004. While Mr Tepaki could not recall any discussion about a $60,000 salary at that meeting, I am satisfied that that was the figure discussed at the time as being the salary for both of the Plaintiffs to work for the Tepaki Group in the Cook Islands. Mr Tepaki accepted there was a discussion at this time and that he had said something to the effect that they could pay themselves what they wanted because they had supported him. Of course that was not intended to be taken literally but it does illustrate the fact that the Plaintiffs' income levels were discussed at that time.

35. The Plaintiffs were criticized for not then endeavouring to obtain a written contract of employment. The point was made that other employees of the Tepaki Group did and that in New Zealand Mr Framhein also did. Of course, with the benefit of hindsight, it would have been desirable for there to have been a written employment contract. It may have been unwise not to have one but it is far from fatal. I accept that Ms Eitiare did not feel the need to push for a written contract because she trusted Mr Tepaki as both family and a friend.

36. Ms Eitiare finished her employment on the 17th of December 2004. By this time the Plaintiffs were committed to traveling to the Cook Islands and working for the Tepaki Group. Both thought they were going to be employed on a $60,000 salary.

37. I accept that the ground shifted at a meeting on 21 December 2004 attended by Mr Framhein and Mr and Mrs Tepaki. Ms Eitiare was not there. Mr Tepaki said this was the first meeting when income levels were discussed but I reject that for the reasons I have set out above. I find that Mr Tepaki said he could only afford to pay $800 per week and that would be the basis of employing Mr Framhein but that he would not employ Ms Eitiare. I make no finding as to whether in fact the Tepaki Group were short of funds or whether, because of the development cycle, Mr Tepaki did not want to pay more than $800. The fact of the matter is that a cap of $800 was set.

38. Not only that, though, but Mr Tepaki went further and said that at the same meeting he had said the $800 would reduce to $300 per week when the Plaintiffs' apartment in Wellington was rented and producing what was estimated to be a rental of $500 per week. Mr Tepaki said that free rental in the Tepaki Group residence, board, telephone etc would be in addition to the $300. I reject his evidence. I find that the income agreed was $800 per week. Both of the Plaintiffs were unhappy about the change of events on 21 December, and upset by them, but at the same time they accepted that was the reality of their return to the Cook Islands.

39. I note that the first time that it was asserted in writing that the $800 would reduce to $300 per week occurred after their employment had ended on 2 September 2005.

40. It is often difficult to analyse oral contracts of employment in terms of simple offer and acceptance. Here, there were obviously discussions and negotiations over a period of time but the fact of the matter is that in late December 2004 the Plaintiffs returned to the Cook Islands and started working for the Tepaki Group and did so on what they thought were wages of $800. They could have walked away at that point but they chose not to do so. They started work. That was when the contract was formed.

41. I have already set out my conclusion and assessments of the witnesses. I have not reached my conclusions on the level of wages solely on the basis of that assessment. I have also taken account of subsequent facts to cross-check what the terms of the contract were. The New Zealand Court of Appeal has on a number of occasions, including recently, concluded that it is appropriate to interpret a contract by reference to subsequent events.

42. Mr George argued that the Plaintiffs' reward would come in the future as a result of shares in Tepaki Investments Limited that were gifted to Mr Framhein. That was unpleaded but, in addition, there were some other problems with that argument:

(a) it is inconsistent with the admission by the Defence of employment at $300 per week;
(b) it was never accepted by the Plaintiffs;
(c) there can be no certainty, in any event, that the shareholding in Tepaki Investments Limited will be of value.

43. The Plaintiffs gave detailed evidence of claims and assertions made by them to Mr Tepaki or others in the Tepaki Group that there should be payment to them of $800 per week. They referred to two emails to

which they received not response. They were sent in January and then March 2005. The impression I gained from Mr Tepaki's evidence was that he was not aware of them but I reject that. I find that he did know but chose to let the matter hang. I found persuasive Ms Eitiare's evidence as to what she said to Mr Tepaki at a meeting in March 2005 when she repeated the claim for $800.

44. I find that the Plaintiffs undertook many and varied duties for Mr Tepaki. They worked long hours and did their best. Mr Tepaki accepted that Mr Framhein is a worker and that he had been effective in his role. There were no criticisms made of his services rendered but I noted a general attitude from Mr Tepaki that Mr Framhein, in particular, had not done very much really. This is a position adopted for tactical reasons in this litigation rather than because it is the truth. Ms Eitiare's diary makes it clear just how much work both of the Plaintiffs did.

45. I now turn to the issue that arose in July 2005 when there was an application made to the ASB to raise monies totaling $60,000 to be secured against the Plaintiffs' assets. I have already introduced this topic in addressing credibility issues. I accept the Plaintiff's evidence that this was an attempt to raise monies to assist the Defendant's operations. That ultimately failed and the application was declined except as to $10,000 to cover credit card debts incurred to pay the Plaintiffs' living expenses and other expenses incurred by them.

46. The most significant aspect of the application to the ASB is the draft letter prepared by Mr Framhein and submitted to Mr Tepaki for his signature. Mr Tepaki amended the draft and signed it. In his amendment he said that the Plaintiffs were employed at $80,000 per annum plus extras. In cross examination he said it was a true

statement although then resiled and said it was true in the sense that it was intended to be the case in the future. I find Mr Tepaki's explanation unconvincing. The text that he added without prompting from the Plaintiffs is revealing. I find that his amendments to the letter corroborate the conclusions I have set out above.

47. I was initially concerned that the Plaintiffs may have told the ASB that the purpose for seeking funds was for their radio station, but I am satisfied that the funding application had nothing to do with the proposed radio station. Overall, I reject any assertion that the proposed radio station was a large or motivating factor in the Plaintiffs returning to the Cook Islands. Clearly they were interested in progressing that but I find the primary reason they returned to the Cook Islands was to be employed by the Tepaki Group at $800 per week.

48. On the evidence before me, I am satisfied that the attempt to raise funds from the ASB shows that the Plaintiffs were willing to put their assets on the line to help the Tepaki Group. Again, it appears to me to be inconsistent with an allegation that they were ripping them off.

49. Finally, I deal with the question of the Tepaki Group residence. This was not pleaded and I am satisfied that it is essentially irrelevant. It was not intended to be part of their remuneration. I note from Mr Tepaki's amendments to the ASB letter that the residence was said to be in addition to the salary amount set out in that letter.

50. The above reasoning explains how I have concluded that the Plaintiffs were to be employed at $800 with no reduction to $300. I now need to address whether both of Plaintiffs were so employed and who employed them because thus far I have been speaking in general terms. It seems fairly clear to me that both the Plaintiffs were

employed despite Mr Tepaki's equivocations on 21 December 2004. It is admitted in the pleadings and, while that is not binding upon me, it is persuasive. I find that both were employed. It is slightly unorthodox that there should be a joint employment contract but that was the agreement reached.

51. The more difficult issue is to decide who employed them. It does appear to be common ground that if anyone was an employer it was Mr Tepaki. In one sense this affects the reality of the role he played in the affairs of the Tepaki Group. It is not a complete answer because Mr Tepaki also chooses to conduct business through corporate vehicles for whom he is the alter ego. Mr Vakalalabure argued that privity of contract meant that the companies could not be liable but with respect that is beside the point. A company can only act through human agents whose conduct and thoughts are attributed to the company. The Privy Council decision in Meridian is the best and most recent example of this. Consequently there is no reason at law that prevents me finding that one or both the companies were employers as well as Mr Tepaki personally.

52. The Plaintiffs were involved in the affairs of both companies and, as Ms Eitiare said in evidence, most closely involved with Tepaki Investments Limited which appears to have been in existence at all material times.

53. I conclude that the Plaintiffs were employed by the First and Third Defendants jointly and severally. There can only be one recovery of wages, notwithstanding that I find that both of those two Defendants are liable. The Plaintiffs do not succeed against the Second Plaintiff.

The Dell Computer

54. Mr Framhein took the Dell computer when he left his employment in 2005. The question I need to address is whether he has to account for its value. In his email, which is set out at page 292 of the bundle, Mr Tepaki said that Mr Framhein could keep the computer so long as access was granted to the Tepaki Group to extract relevant data belonging to the Tepaki Group.

55. I heard evidence from the Plaintiffs as how Helen Wong attended upon them and downloaded data on or about 7 September 2005. The Defence indicated they would call Ms Wong but chose not to do so. In all the circumstances there is no reason to doubt the evidence of the Plaintiffs on that topic.

56. I find that the data was downloaded. Mr Tepaki's condition was satisfied. No account needs to be given for the computer.

Counterclaim

57. It is alleged that the Defendants rented a car park to the Plaintiffs for $50 per week for 32 weeks. The Plaintiffs accepted they had use of the car park but denied any agreement to rent it.

58. Mr Tepaki in his evidence in chief said that the weekly value of the car park was $45 rather than the $50 claimed. When asked by Mr George if a charge was to be made he answered by saying, "we just carried it." There was no reference by him to an agreement to pay rental at $50. In those circumstances I cannot see any basis to uphold the counterclaim and I dismiss it.

Outcome

59. The First and Second Plaintiffs succeed in their claim against the First and Third Defendants in the sum of $25,024.38 plus interest from the date that the proceedings were issued. Liability is joint and several. The Defendants fail in their counterclaim against the Plaintiffs.

60. On the question of costs, I will receive memoranda from the Plaintiffs within 14 days and then from the Defendants 14 days after that. As part of the process of dealing with costs, counsel should address the following four issues:

(a) the relevance of any of the serious allegations and insinuations of dishonesty;
(b) the apparent fact that the balance of the counterclaim will now fail as a result of my findings in relation to the Dell computer;
(c) the extravagantly high claim of damages of $1.5m made on that counterclaim;
(d) whether the Second Defendant is entitled to any costs bearing in mind that the Defence was conducted jointly with all of the Defendants.

Judge