



**IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION**

Civil Suit No. 10 of 2018

BETWEEN

Joshua Scotty

Plaintiff

V

Jacob Scotty

Defendant

Before: Judge Rapi Vaai

APPEARANCES:

Counsel for Plaintiff: E.Soriano

Counsel for Defendant: J.Olsson

Date of Hearing: 14 October, 4 & 6 December 2019

Date for Decision: 17 April 2020

Ruling

INTRODUCTION

1. This action is grounded on breach of contract. The plaintiff is the older brother of the defendant. In the year 2014, the plaintiff who was living in Fiji with his wife arranged and

shipped to Nauru various items which by agreement the defendant would sell on behalf of the plaintiff.

2. The defendant did sell the goods sent to him and remitted AUD \$1000 to the plaintiff. The plaintiff claims that the value of the goods sent to the defendant was AUD \$18,879 and when he confronted the defendant in Nauru in 2016 the defendant assured he will settle the amount outstanding.
3. The defendant denies he owed any money and accordingly denies giving an undertaking to pay any money to the plaintiff. He also claims the unsold items were returned to the plaintiff.
4. In 2017 whilst the defendant was living in Samoa and in need of cash, he offered to sell to the plaintiff then living in Nauru certain items on his land in Nauru at a price of AUD \$25,000.
5. The plaintiff claims he accepted the offer on the basis that the \$18,000 owing to him by the defendant in 2014 would be deducted and \$7,000 would be paid by instalment. Instalment payments totalling \$4,000 were sent to the defendant as agreed to. But after payments totalling \$4000 was made the defendant returned to Nauru and repossessed his materials.
6. The defendant insists he owed no monies to the plaintiff in 2014. He also contends he was entitled to terminate the agreement of 2017 when the plaintiff failed to honour the repayment schedule agreed to.

The plaintiff's claim

7. The plaintiff testified that pursuant to the arrangement with the defendant, the plaintiff in 2014 purchased various items and commodities in Fiji and sent them to the defendant in Nauru. He kept receipts of all the items purchased as well the receipts for freight to Nauru. Total purchase price of the goods sent to Nauru was \$18,879. Only AUD \$1,000 was remitted by the defendant.

When the plaintiff travelled to Nauru and confronted the defendant, the defendant assured the payment of the balance once he has sorted his marital problems.

8. The plaintiff also told the court that in 2017, the defendant, who was then living in Samoa offered to sell to the plaintiff various items on his land at Nauru. After negotiations it was agreed the price for the items was \$25,000.

The items included:

- (i) Land on where the defendant has laid foundation for his house
- (ii) Water tank
- (iii) Wall water system
- (iv) Shipping container containing various goods.

The plaintiff agreed to purchase the chattels on the basis that the \$17,879 owing by the defendant from the 2014 agreement would be deducted leaving a balance of \$7,000 to be paid by instalment. This agreement was negotiated and agreed to during March to May 2017.

9. Between March and May 2017 the plaintiff made five instalment payments by direct bank draft totalling \$3,750 and one cash payment of \$250. However subsequently not long after in the same year the defendant returned to Nauru and repossessed the chattels.
10. The plaintiff claims the \$17,879 owing to him under the 2014 agreement as well as the \$4,000 he paid to the defendant pursuant to the 2017 agreement.

The defendant's case

11. In his amended statement of defence and counterclaim the defendant admits receiving goods sent by the plaintiff from Fiji but he was not aware of their prices, he admits selling them and he admits sending \$1,000 to the plaintiff. He also alleged the unsold items were given back to the plaintiff upon the plaintiff's return to Nauru.

He denies confessing to the plaintiff that he will reimburse the plaintiff for the value of the items sold because he did not owe any money to the plaintiff.

12. In respect of the 2017 agreement the defendant admits he offered to sell his land and items stored on the land to the plaintiff and he accepted the plaintiff's offer of \$25,000. It was agreed that the payment of \$25,000 will be by fortnightly payments of \$1,000 each. The defendant denies a deduction of \$18,000 for his debt from the 2014 agreement because he owed nothing to the plaintiff in 2014.
13. He alleges that only \$3,750 was paid by the plaintiff and because the plaintiff failed to comply with the agreed payment schedule of \$1,000 per fortnight the defendant put an end to the agreement. He did promise to refund the plaintiff's \$3,750.
14. The defendant seeks the following reliefs:
 - (a) Declaration that there was no agreement between the plaintiff and the defendant that linked the alleged jewellery sales (2014) to the property agreement (2019)
 - (b) Declaration that there was an agreement between the plaintiff and the defendant (2017) in relation to the defendants said properties.
 - (c) Declaration that the plaintiff breached the said 2017 agreement.
 - (d) Declaration that the plaintiff had trespassed broke the lock and entered into the defendants shipping container.
 - (e) Declaration that the plaintiff had removed and sold items from the shipping container.
 - (f) Order for damages and costs of the property stored in the container which the plaintiff removed and sold.
 - (g) General damages and costs.
15. The defendant did not testify or call witnesses.

Plaintiff's response to the counterclaim

16. The plaintiff denies there was agreement in 2017 for fortnightly payments of \$1,000 by the plaintiff.

Conduct of trial.

17. On the 2nd July 2019 the Registrar set the matter down for hearing before me on the 15th and 16th July 2019 but the defendant failed to appear on the 15th July and counsel for the

plaintiff requested the matter to be adjourned for pre-trial conference to attempt settlement. It was then adjourned to the 26th July 2019 for mention.

18. The adjournment enabled the plaintiff to obtain leave to amend the statement of claim and did file an amended statement of claim. When all pleadings arising from the amended statement of obtaining was finalised the registrar set the matter down for hearing on the 14th and 15th October 2019.
19. On the 14th October the defendant made no appearance, his counsel told the court the defendant had travelled to Kiribati for a family matter and an adjournment was sought which the plaintiff promptly opposed. It was then agreed that the plaintiff will proceed to present its case and the matter then adjourned for the defendant to conduct its defence and counterclaim. At the conclusion of the plaintiff's case on the 14th October the hearing was then adjourned to 4th December 2019. Defence counsel advised three witnesses will testify.
20. After the defendant was sworn in on the morning of the 4th December he requested a translator resulting in the proceedings to be stood down until the arrival of a translator. About 12 noon the translator arrived but by then the defendant disappeared from the court house without his counsel's knowledge. Attempts by his counsel to contact him on his mobile phone failed. His counsel sought further adjournment as defendant was the only witness to support his defence and counterclaim.
21. Application for further adjournment was refused and proceedings adjourned to 6th December for submissions.

Findings of facts

22. It is common ground that there was agreement in 2014. The issue for determination is whether the defendant owed monies to the plaintiff pursuant to the agreement and if so how much.
23. It is also common ground that in 2017 the defendant offered to sell his land and chattels. The price and time of payment by the plaintiff are in dispute.

24. In her closing submissions counsel for the defendant referred to affidavit filed by the defendant. There is no such affidavit on court file; counsel for the plaintiff does not have a copy; when asked for her copy counsel for defendant did not have one. She responded she told the defendant to file the affidavit.

The point remains how can counsel refer to contents of an affidavit which does not exist.

25. I will deal first with the 2017 agreement which on the evidence was initiated by the defendant. This is also conceded by the defendant's counsel in her submissions. The agreed price was \$25,000 for the chattels only. It excluded the price of the land which was jointly owned by the defendant with several others including the plaintiff.

26. On the balance of probabilities I am satisfied it was agreed that the amount of \$18,000 owing by the defendant in 2014 was to be deducted from the agreed price of \$25,000. I also accept that payment of \$1,000 per fortnight for the balance of \$7,000 was not stipulated in the agreement.

The plaintiff did pay to the defendant the sum of \$4,000 and soon after the payment of the fourth instalment the defendant took back his chattels from the plaintiff.

27. As conceded to by the defendant he did not return the money paid to him by the plaintiff. The amount paid was \$4,000.

28. In respect of the 2014 I have accepted that when the 2017 deal was negotiated it was accepted that the 18,000 owing by the defendant in 2014 would be deducted in the 2017 agreement. The plaintiff did explain to the court how the 2014 debt was accrued. The defendant knew of the evidence which was tendered; he was given the opportunity to respond to and discredit it. He chose not to; he attempted through his counsel to drag the hearing by seeking a further adjournment. He was simply not prepared to be cross-examined under oath.

Discussion

29. When the defendant put an end to the 2017 agreement he attempted to justify it by alleging default by the plaintiff to comply with time for payment.

Time was not made the essence of the contract. Even if it was, the plaintiff should have been given time to rectify the breach.

But there was no breach by the plaintiff, there was no indication of unwillingness or inability by the plaintiff to perform his part of the bargain.


30. Counsel for the defendant in her written submissions contended inter alia that the 2017 contract was tainted by illegality when the plaintiff accepted to buy the defendants land and chattel. Purchase of land is illegal and enforceable without the Presidents consent. Section 3 (4) of the Lands Act 1976 stipulates that any transfer, sale, contract, or agreement in contravention of the Act is void and of no effect.
31. The offer to sell the land was made by the defendant. The plaintiff made the offer of \$25,000 for the chattels only. The plaintiff has already been allocated a piece of land to build. He also knew the defendant was a co-owner with an undivided share in the land. He could not sell the land. The plea of illegality must fail.
32. Submission by counsel for the plaintiff is confusing on the cause of action. At the introductory part he states: "The case before the court is about an agreement made between two brothers, an agreement that seems perfect at first but was later disregarded by the defendant."

This introductory part of the submissions is in conformity with the pleadings in the amended statement of claim. A breach of contract is the issue. But under the sub-heading The Law, he states: "The plaintiffs claim is one in restitution and as such can broadly be accepted as a claim in unjust enrichment. Unjust enrichment unlike fraud does not require to be pleaded specifically".
33. The pleadings do not raise or support an action in restitution or quasi-contract (as it is also called) which the common law courts developed to provide remedies for cases of what has been called unjust enrichment or unjust benefit. The test for unjust enrichment is stated in the English text: The Law of Restitution 3 ed p16, Goff & Jones: "[Unjust enrichment] presupposes three things, first that the defendant has been so enriched by the receipt of the benefit; secondly, that he has been so enriched at the plaintiffs expense; and, thirdly that it would be unjust to allow him to retain the benefit."

34. Restitution or quasi contract is generically different from remedies in contract and tort.
35. In any event the plaintiff succeeds in his claim for breach of contract. The defendant did not appear to pursue his counterclaim and the counterclaim should be dismissed.

Result

- (i) Judgement for the plaintiff in the sum of \$21,189.
- (ii) The defendant's counterclaim is dismissed.
- (iii) Cost for the plaintiff to be fixed by the Registrar if not agreed upon.


R. Vaai
Judge

