

Gabrielli v Halsie, Mayer and Mataele

Supreme Court

10 Tupou Ag J

Civil 101/81

Contracts - Contract Act does not apply to agreement by non Tongans to develop tourist resort

Contracts - party to contract alleging that other party intended to repudiate contract must produce corroborating evidence.

20 Mrs Gabrielli entered into an agreement dated 17/9/1980 with Messrs Halsie and Mayer, who were not Tongans, and Mataele that she would "manage and develop Fafa island as a tourist holiday enterprise in close cooperation" with the three men. The agreement contained a clause that if she decided not to go ahead with the enterprise she would forfeit the sum of T\$1500 she had paid at the time of signing the agreement. Later a dispute developed between the parties and Mrs Gabrielli declined to proceed with the project, and sued the other parties for the return of the T\$1500 paid by her, claiming that the defendants had indicated that they did not wish to proceed.

30 **HELD:**

Dismissing the claim.

- (1) The agreement of 17/9/1980 was not subject to the provisions of s5 Contract Act.
- (2) The burden of proof was on the plaintiff to prove on the balance of probabilities that the defendants had indicated that they did not intend to proceed, and she must produce corroborative evidence to support her allegations, which she had not done.

40 Tupou Ag J

Judgment

This case has been made difficult by the fact that three languages had to be used - English, Tongan and German, and the pleading by both parties have been poorly made and in certain important respects are quite inaccurate and unsupported by the evidence produced. In the statement of claim the plaintiff alleges that a company was to be formed and registered but no evidence was produced at the hearing to support this allegation. In the statement of defence the defendants alleged that a written agreement was unenforceable and yet at the hearing they relied on the provision of forfeiture in that very agreement to support their defence. Be that as it may, I will give judgment on the evidence produced before the Court.

Put briefly, the facts of this case are as follows. By a agreement dated 17th September 1980 the plaintiff agreed with the three defendants that she "will manage and develop Fafa island as a tourist holiday enterprise in close co-operation" with the three defendants. Under the same agreement it is stated that the plaintiff will go back to Germany and return to Tonga no later than 1st June 1981, a 10% down payment of T\$1500-00 was to be paid by the plaintiff and the remainder of T\$13,500-00 will be paid on her return to Tonga "at which time she will start with the actual management of the island". Finally the agreement states "In such case as Elgin (plaintiff) decides not to go ahead with the project the 10% downpayment will be forfeited". The negotiation of this agreement was conducted in the German language between the plaintiff and the first and second defendants without the presence of the third defendant but with the help of a third party who wrote the agreement in English. The agreement was later taken to the third defendant who signed it as one of the agreeing parties.

On a preliminary point at the hearing I held that the agreement was validly concluded between the parties and was not subject to the provisions of section 5 of the Contract Act (Chapter 113).

Pursuant to the said agreement, the plaintiff paid T\$1500-00 as downpayment to the first defendant. In evidence the second defendant said that the T\$1500-00 was used to buy materials needed for a start for 20 workers on the island and a generator. The generator costs T\$650-00 and T\$750 was given to the third defendant who used that money to buy an outward motor for T\$500-00 and the rest for the workers on the island.

The plaintiff went to Germany to wind up her affairs and returned to Tonga on the 14th February 1981 to continue the agreement. The plaintiff said in evidence that she was met at the airport on arrival by the second defendant and another person and they went to the Tonga Club where she was informed by the second defendant that the agreement regarding Fafa island could not be continued and suggested that she should put her money into the development of Joe's Hotel. The second defendant denies making these statements to the plaintiff. I will pause here because I think that this meeting at the Tonga Club and the discussion between the second defendant and the plaintiff is important to this case. I note that the third person was not called to give evidence to support either side. I therefore must look to other evidence to decide which version i.e. the plaintiffs or the second defendant's recollection of that discussion is the more probable.

The importance of the discussion held at the Tonga Club rests on the fact that as the case has turned out, the plaintiff is alleging that the defendants repudiated their contract and that she is therefore entitled to accept that repudiation and treat the contract as having ended and her down payment of T\$1500-00 should therefore be returned to her. The

defendant's answer is that it was the plaintiff who refused to go through with the contract and she should therefore forfeit the down payment in accordance with the terms of the agreement of 17th September 1980.

Looking at the evidence given by those witnesses called I find that the next discussions about the Fafa island project took place about three weeks after the plaintiff's return to Tonga. The only common thing which I can find in the evidence of the three witnesses is that the plaintiff did not wish to continue with the Fafa island project. The plaintiff in evidence said that she could not continue with the project because she found out that the first and second defendants had made other arrangements with another person to carry out the project and although the third defendant offered for her to continue, she could not because she cannot build houses on Fafa island. She also says that when she last went to Fafa island on 23 May 1981 she saw that nothing had been done to the island since the agreement was made. The second defendant in evidence said the plaintiff refused to continue the project because she heard that Fafa island did not belong to the third defendant. The third defendant said the reason given by the plaintiff for not continuing with the project was because she had other thoughts on lines of business she should do.

It is an accepted principle of law that one contracting party cannot anticipate a breach of contract by the other party and act on it as though the breach has happened. Nor can one act on what has been "found out" or "heard" or "feel" without proving that "finding out", "hearing" of "feeling" with corroborative evidence. No such corroboration was produced in evidence by the plaintiff on whom the onus of proof lies to prove her case on the balance of probabilities. The only possible evidence of breach of contract by the defendants sufficient to discharge the plaintiff from the obligations of the agreement is the discussion held at the Tonga Club with the second defendant on the 14th February 1981. I can find nothing in the evidence produced to corroborate or prove the plaintiff's version of that discussion. The onus is on the plaintiff to prove her case on the balance of probabilities and I am not satisfied that she has discharged that onus.

The agreement of 17 September, 1980 contains a provision for forfeiture of the down payment of T\$1500-00 paid by the plaintiff if she decides not to go ahead with the project at Fafa island. On her own evidence the plaintiff has stated that she does not wish to continue with the project. The reasons she gave have not been supported by any evidence sufficient to discharge her onus of proof. I sympathise with the understanding of the plaintiff as to the meaning of the forfeiture provision. But I must interpret the agreement objectively and in a business like manner and that interpretation is clear from the words of the agreement, that is, that the plaintiff forfeits her down payment if she decides not to go ahead with the project. For the reasons given, I enter judgment for the defendants.

I make no order as to costs.