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

C.NO.456/96

BETWEEN : TAUBMANS PAINTS (FIJI) LTD. : *Plaintiff*

AND : 1. SIONE FALETAU

2. TRIDENT HEAVY ENGINEERING : *Defendants*

BEFORE THE HON. MR JUSTICE FINNIGAN

Counsel : Mr Niu for Defendants No appearance for Plaintiff

Date of Hearing : 8 December 1998
Date of Judgment : 15 January 1999

JUDGMENT OF FINNIGAN, J

This has been the hearing of a counterclaim by the second defendant. It is before the Court as the result of an appeal, which was decided by the Court of Appeal on 20 June 1997 (App No 15 &16/97).

In its judgment the Court of Appeal held that the real issue between the parties in the counterclaim had not been decided during the hearing which was under appeal, as a result of inadequate pleading. It referred the case back to this Court for further consideration on a proper pleading of the cause of action upon which the second defendant relies. Leave was granted to both parties to file fresh pleadings. Each party filed. The Court also suggested to the parties that they resolve the matter by actively exploring the possibility of agreement. That suggestion was strongly endorsed subsequently by this Court.

The matter however was not settled. Neither did it come readily to hearing, for one stated reason and another. Eventually, counsel for the plaintiff sought and was granted leave to withdraw, and the matter was set down finally for hearing on 8 December 1998. The parties were notified that there would be no further adjournments. From correspondence supplied to me I am satisfied that the plaintiff was made aware of the hearing, and had told counsel for the second defendant that it intended to be present. However it did not appear, and the only evidence heard was the unchallenged evidence of Mr Sione Faletau Jr, who is the first defendant and the managing director of the second defendant.

THE PLEADINGS

In its amended counterclaim the second defendant pleaded, in detail, a contract between the parties, whereby the second defendant was appointed for one year the sole stockist and

distributor of the plaintiff's products in Tonga. It pleaded unlawful termination of that agency, and thus breach of the contract. It claimed that the second defendant lost thereby the opportunity to acquire 40% of the total paint market in Tonga, and with that the opportunity to make a nett profit within the year of the contract of $160,260. It claimed that sum in damages, plus interest on that sum at 10% per annum from 18 October 1996 until payment, and costs.

The plaintiff in its statement of defence denied in general the pleaded legally binding agreement. It denied unlawful termination of any agreement, and it denied the claimed grounds for relief. In other words, it put the second defendant to the proof of its counterclaim.

THE EVIDENCE

From the evidence of the first defendant, who is managing director of the second defendant, I am left with no alternative but to find that the plaintiff and the second defendant entered into a completed contract for sole agency as pleaded, for one year, with a clear prospect of renewal. The evidence satisfies me that this agreement was concluded by oral arrangements entered into by the first defendant with the plaintiff's merchandising manager Mr Deven Sharma, and by a letter dated 18 October 1995 from the plaintiff's general manager and by the contemporaneous shipping of product by the plaintiff to the defendant. There is further clear evidence of this contract in the correspondence from the plaintiff to the second defendant, over termination of their arrangement. Clearly the term of the agency was for one year, with expectation of renewal.

The witness gave evidence about the actions of the plaintiff in cancelling this agreement soon after it commenced. He produced documents. What occurred was as follows. An employee of the second defendant, Seluini, was dismissed on 30 November 1995, after he claimed that it was he, not the second defendant, who was the sole agent for the plaintiff's products. Seluini brought proceedings in this Court to exclude the defendants from access to the first shipment of the plaintiff's products. On 8 December 1995 he obtained *ex parte* an interim injunction to that effect, which was varied in a minor way on 12 December. On 11 December, the plaintiff assured the second defendant that the second defendant had exclusive authority over that shipment, but that same day advised the second defendant that "since the apparent disintegration of relations between Trident and (ex)employee Koloti [Seluini], all standing arrangements cease to be effective, as part of our decision to appoint Trident was based on the company structure at that time". The plaintiff expressed concern about who would pay for the first consignment. The second defendant, prevented by the interim injunction, was unable to gain possession of it.

On 29 January 1996, the plaintiff wrote to the second defendant that it withdrew its Tongan distributorship from the second defendant, effective immediately. The stated ground for this was that the second defendant had moved well beyond the agreed 60-day term for payment, and that, despite its knowledge of the second defendant's "legal wrangles" with Seluini, it could not tolerate the delay in account settlement. It said it would implement recovery action for the money due to it unless payment proposals were made.

As this Court found, and the Court of Appeal accepted, the second defendant did make proposals for payment, particularly in a letter dated 15 February 1996, and the plaintiff agreed. It seems to me that the payment was due, and was claimed, under a different contract from the sole agency contract. The reference by the plaintiff to an agreed 60-day settlement

term highlights the fact that the sole agency contract was not a contract for supply and payment. There was a separate contract on the placing of an order and acceptance of payment terms. The correspondence suggests that the second defendant may have given some form of guarantee that it would pay. These separately created liability for payment for each shipment. The sole agency contract was a separate agreement for a continuing relationship.

I find that the plaintiff took two steps to cancel the sole agency contract. First it notified on 11 December 1995 that all standing arrangements ceased to be effective. This was for the sated reason that the company structure had changed. Then on 29 January 1996 it expressly withdrew the distributorship. The stated reason was the unpaid invoices. In my view there was clearly a cancellation of the sole agency contract. I am required to consider, was this cancellation done in breach of the contract?

The term of the agency was for one year, with expectation of renewal. From the evidence I find that the ground of a change in the second defendant's company structure was not an express contractual ground for termination of the agreement. Was it an implied term? There is nothing in the evidence to suggest that it was. I rather doubt in any event that Seluini's dismissal, if that is what was meant, was a change in the second defendant's company structure. From the evidence I find that the ground of non-payment for the first consignment or for any consignment was not an express contractual ground for termination of the agency agreement. Was it an implied term? There is nothing in the evidence to suggest that it was. What existed was a simple debt situation. Other remedies, including debt collection remedies, as mentioned by the plaintiff in its letter of 29 January 1996, were open to it within the stated and implied terms of the contract.

On both occasions, 11 December 1995 and 29 January 1996, the plaintiff's action was a unilateral change of mind without foundation in the agency contract. It was not justified by any conduct or omission of the second defendant which, to the plaintiff's knowledge, had been prevented by circumstances outside its control from trading with the consignment for which payment was outstanding. What was needed to justify cancelling the agency contract before its term expired was some repudiation or default by the second defendant that was fundamental, going to the root of that agency contract. Failure to pay for the first consignment was not a repudiation or default of that kind. It was the plaintiff's action that was a unilateral repudiation of the agency contract and thus a breach of the contract. I find that it gave the second defendant the right in law to accept the repudiation and sue the plaintiff for damages.

From the evidence, which was detailed, I accept that the second defendant's expectation of gaining 40% of the total paint market in Tonga was founded on reasonable market research and upon assurances from prospective customers. Some documents showing that research and those assurances were put before me. The market research, which was described to me, included acquisition of statistical data, upon which projections were founded. I was shown in the documents produced, the figures calculated by the second defendant as the costs of the agency business for the first year. I was shown the detailed calculations by which it estimated that the nett profit of the operation for the second defendant, before depreciation and before tax would be $160,260.

There is no measure by which I can test the evidence other than its apparent reasonableness and inherent credibility. If it appears on the balance of probability to be true, then I must

accept it, I have no other course open to me. It appeared to me throughout the hearing to be inherently credible, and the witness' main assertions all seemed reasonably founded upon other facts that were proved. In particular, his assertion of the existence of the contract itself was supported by other evidence that he produced, and his assertions of the likely market share and likely profit appear to rest comfortably on the evidence of likely sales and likely costs.

I find therefore that the claims of the second defendant are made out on the balance of probabilities. I find that on the balance of probabilities the pleaded contract of sole agency is proved. I find on the same standard that it was wrongfully terminated by the plaintiff, in its letters of 11 December 1995 and 29 January 1996. I find also on the same standard that the claimed damages are proved. On the amended counterclaim there is judgment for the second defendant in the sum of $160,260. Interest on this amount is allowed at 10%, to run from the date of this judgment until payment.

Costs are allowed to the second defendant, to be agreed or taxed.

SUPREME COURT TONGA

NUKU'ALOFA, 15 January, 1999 **JUDGE**