L T ENDEMANN & COMPANY LTD v ROEBECK (TAUTULU) AND PHILIPP (CHRIS) TRADING AS SAMOA HANDCRAFT INCORPORATED

Supreme Court Apia
Ryan CJ
11 February, 17 February 1992

CONTRACT LAW - contractual relationship can create a fiduciary relationship - implied term to be read in that Defendant personally liable.

COMPANY LAW - Limited liability - whether limited liability existed - non-existence of company at time of entry into contract - genuine belief company duly incorporated - distinction between incorporation and limited liability - infer personal liability on the part of the agent where the alleged principal is not in existence.

The plaintiff sued the Defendant for the balance owing for work carried out on the renovation of a building. There was a defence raised at the hearing that the Defendant was not personally liable for the moneys claimed but that the company Samoa Handcraft Limited was responsible.

HELD: In addition to the contractual relationship an implied fiduciary relationship existed whereby the Defendant was to be responsible for the payment of the moneys due under the contract should there be no such legal entity as Samoa Handcraft Incorporated in existence then or ever.

Richmond Ltd v D H L International (NZ) Ltd (High Court) Auckland 23.8.1991 CL 91/90

CASES CITED:

- McBride v Brown [1960] NZLR 782
- Hawke's Bay Milk Corporation Ltd v Watson & Others [1974] 1 NZLR 236
- Marblestone Industries Ltd v Fairchild [1975] 1NZLR 529
- Kelner v Baxter (186) L.R. 2 CP 174
- re Empress Engineering Co [1880] 16 Ch.D.125, C.A.
- Richmond Ltd v D.H.L. International (N.Z.) Ltd High Court Auckland 23.8.1991 CL91/90
- The Moorcock [1889] 14 PD 64
- Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 K.B. 592
- Shirlaw v Southern Foundries (1926) Ltd [1939] 2 K.B. 206

R Drake for Plaintiff
E F Puni for Defendant Philipp

Cur adv vult

The Plaintiff sues the Defendant for $62,794.00 being the balance of $88,445 for work carried out on the renovation of a building at Tauese, Apia, in late 1989.

There is very little dispute as to the facts and quantum is admitted. The action took a rather unusual turn at the hearing on 11th February 1992 when counsel for the Defendant, Mr Puni, raised as the only defence, prior to the calling of evidence, that the Defendant was not personally liable for the moneys claimed but rather that a company Samoa Handcraft Limited was responsible. That was a defence that could be said to have been obliquely pointed at in the Statement of Defence but clearly took Counsel for the Plaintiff Mrs Drake, quite by surprise. There had apparently never been any suggestion in any correspondence or in any other way in the two and a half years up to the date of the hearing that such a defence would be attempted.

Given the unusual turn of events I thought that the Defendant should begin to establish the positive defence being put forward. Mr Puni did not take issue with this. In this situation the general rule is that, where a negative allegation is made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, must prove it see McBride v Brown [1960] NZLR 782. Here the Defendant asserts that at all times he signed the contract and acted on behalf of Samoa Handcraft Incorporated. He must accordingly prove that he is under no liability on the balance of probabilities.

It is not in dispute that there has never been a legal entity at least for the purposes of this dispute, known as Samoa Handcraft Incorporated. However a written contract was entered into by the Plaintiff as Contractor and Samoa Handcraft Incorporated as Principal on 26th July 1989. The document was signed by "C M Philipp for Samoa Handcraft Incorporated". The Principal in the contract was named as Samoa Handcraft Incorporated. Work duly commenced and the Defendant, a duly qualified quantity surveyor on 28 August 1989 issued a Certificate of Payment for $26,651. Payment was duly made. Further Certificates were issued on behalf of Samoa Handcraft Incorporated on 24 October 1989 for $32,318, 28 November 1989 for $6,849 and 17 January 1990 for $14,782.

There had apparently been some discussion between Mr Endemann of the Plaintiff company and Mr Philipp as to whether what he, Endemann, was dealing with was a company. Mr Philipp in his evidence said he told him it was Samoa Handcraft Incorporated, that he was a consultant to it and also a shareholder.

Mr Philipp said he signed papers along with 8 other persons in May/June 1989. He said he signed up for $5,000 and paid $2,000-$3,000. He said he found out that it was not incorporated on 24 October 1989 when the second claim came in from the Contractor. The Companies Office records show that a company known as Samoa Handcrafts Limited was incorporated on 15 February 1990. Further the records disclose that the Defendant consented to act as a director on 22 September 1989, that he signed the memorandum of association and subscribed for 5,000 shares on 22nd November 1989 and that he signed the articles of association on 22nd November 1989. He is one of 9 directors of the Company. It appears from Mr Philipp's evidence that subsequent to the execution of the documents the company has never met and that he has never taken up with the company the issue of the writ which was served upon him as to the company's liability to meet the claim although he did say that he wanted the company to pay. That really is quite extraordinary and I must say borders on the irresponsible given that he was served with the proceedings in July 1991.

The Defendant in his evidence stated that when he signed the documents for Samoa Handcraft and I intentionally leave out Incorporated or limited, he enquired as to what incorporated meant because it was "the first time I had heard of the word incorporated". He said he asked if it was the same as limited and says he was told that it was by the Company's lawyer. I simply do not accept that such a conversation ever took place. Why would the Defendant talk about the word Incorporated when the documents which he signed and which now appear on Company's office file 903 do not mention the word and in fact demonstrate that he put his signature to three documents at least which contain the words Samoa Handcrafts Limited. Further the Defendant gave evidence that he is a duly qualified quantity surveyor and that he is presently the Manager of Special Projects Development Corporation. That is an organisation set up by statute in 1972 pursuant to which the Manager is also a director of the Corporation: S5(3)(c). It is beyond belief that a person with the qualifications and ability to have attained the Manager's position of such a significant corporation could not know the difference between an incorporated society and the Incorporated Societies Act [illegible] and a limited company and the Companies Act 1955. I can see no reason to disbelieve the evidence on that point and having done so I am satisfied that the Defendant was grossly negligent to put the best possible construction on his actions in holding himself out to be acting as an agent or in any other capacity for Samoa Handcraft Incorporated.

That may not be the last word however on Mr Philipp's possible liability to the Plaintiff. Mr Puni in his closing address argued that the decision of the Supreme Court of New Zealand in Hawke's Bay Milk Corporation Ltd v Watson & Others [1974] 1NZLR 236 was authority which the Defendant could rely upon to avoid a Judgment being given against him. That was a decision where the Court held that the "Defendants were each acting as officers of a company which they genuinely believed had been duly incorporated. In fact, however, that company was not incorporated until 15 May": P239 lines 1 - 4. The situation here is distinguishable upon the facts; Mr Philipp signed for Samoa Handcraft Incorporated. Such a society has never been incorporated but a company under the name of Samoa Handcrafts Limited has been. The corporate structure of an incorporated society is quite different from that of a limited liability company e.g. an incorporated society is not established for the purpose of pecuniary gain and it must have at least 15 members. Samoa Handcrafts Limited was according to its memorandum of association established to carry on business and has only 9 members.

At the conclusion of Mr Puni's submissions, Mrs Drake sought an adjournment to file written submissions on the basis that having been taken by surprise as to the defence run by the Defendant she had not researched the law in this area. I duly granted such an adjournment and allowed Mr Puni a further period to reply. Mr Puni had quite properly in his original submissions drawn the attention of the Court to the decision in Marblestone Industries Ltd v Fairchild [1975] 1NZLR 529 where at P.542 Mahon J had summarised the general principles in this field. Basically those principles are:

(a) that where both contracting parties know that the company does not exist there is a presumption of personal liability.

(b) where there is a mistaken belief as to its existence the contract is a nullity.

The facts here disclose that even after he disclosed in October 1989 that there had been no incorporation (of any sort) he still continued to operate for the non entity Samoa Handcraft Incorporated. To say the least his bona fides must be suspect in those circumstances because the Plaintiff still continued on with its contract and carried out further work to a value of $21,631 no doubt in the false sense of security that all was well.

Mrs Drake argues that the modern trend is to infer personal liability on the part of the agent where the alleged principal is not in existence. That really was the basic principle set out in cases such as Kelner v Baxter (186) L.R. 2 CP 174 and re Empress Engineering Co [1880] 16 Ch.D.125, C.A.

It is important to note that both the Hawkes Bay case and the Marblestone case were decided in New Zealand in the mid 1970's. I very much doubt that, in the present climate in New Zealand, the decisions would have been the same had the disputes come before the Court today. There is a continuing evolution to be discerned in decision making in the High Court and Court of Appeal whereby "fairness" can be seen to be displacing "certainty". "While the common law founders, equity survives" said Barker J in a recent decision in Richmond Ltd v D.H.L. International (N.Z.) Ltd High Court Auckland 23.8.1991 CL91/90. Although that was an insurance dispute the learned Judge held that in addition to the contractual relationship, a fiduciary relationship had been created, and that the actions of one of the parties involved a breach of the fiduciary relationship. Applying that reasoning to the present case there was here the contract between the Plaintiff and the Defendant purporting to act for a non-existent principal. The Defendant says that he signed some documents prior to the contract but there is no evidence whatsoever that he signed them in relation to Samoa Handcraft Incorporated. At best all he signed, wherever he signed them, in relation to incorporation was for Samoa Handcraft Limited.

It may be that the fiduciary relationship which the learned Judge held had arisen in the Richmond case could not be imported into the present dispute and that it may be more apposite to impute an implied term into the contract of 26 July 1989 viz that the Defendant was to be responsible for the payment of the moneys due under the contract should there be no such legal entity as Samoa Handcraft Incorporated in existence, then or ever. Quite literally the high watermark in this field is to be found in the decision of the English Court of Appeal in The Moorcock [1889] 14 PD 64. Bowen LJ at P.68 made the following observations:

> "I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men... The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the (contract)."

Scrutton LJ in the decision in Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1K.B. 592 at pg 605 had the following to say:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract, ie, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would both have replied: "Of course so and so will happen; we did not trouble to say that; it is too clear."

Mackinnon LJ some 21 years later observed in Shirlaw v Southern Foundries (1926) Ltd [1939] 2K.B. 206, 227 the following:

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh of course."

I am perfectly satisfied that here, had an officious bystander been standing by he would have observed "Oh, of course if Samoa Handcraft Incorporated never comes into existence then you Mr Philipp will have to pay the Plaintiff for his work and materials and if you have any other associates involved they will have to indemnify you."

For those reasons therefore I reject the defence put forward by the Defendant and find that the Defendant is personally responsible and therefore liable in law for the claim made by the Plaintiff. No doubt he will now do that which he should have done over 2 years ago and gather together his 8 associates and ensure that the Plaintiff is paid in full without further needless delay.

The Plaintiff will have judgement in the sum of $62,794 together with interest at 12% from 1st February 1990 down to the date of judgement and costs as fixed by the registrar.