JACK SIPISOA -v- PETER TAFEA NE'E, ALVIN IDUKEELEMA and NELSON NE'E

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 139 of 1992
Hearing: 29 October 1992 at Auki
Judgment: 17 November 1992

J. Remobatu for the Applicant
A. H. Nori for the Second and Third Respondents

PALMER J: The Applicant, **Jack Sipisoa** applies by way of Originating Summons for the following declarations:

(i) That the document entitled "**Power to deal in Customary Land**" be rescinded and/or declared null and void in that it was signed by the Applicant by mistake.

(ii) That the document entitled "**Power to deal in Customary Land**" be rescinded and or declared null and void in that it was signed by the Applicant without a Commissioner for Oaths present to witness it.

(iii) That the sale of a parcel of land owned by the Applicant's landowning group by the Respondents pursuant to the document entitled "**Power to deal in Customary Land**" be rescinded and or declared null and void and of no effect.

The existence of the document and the fact that the Applicant appended his signature to the document is not denied.

What is denied is that the Applicant knew what the contents of the document were. In other words he pleads the old common law defence of "**non est factum**".

The facts not in dispute are as follows.

On the evening of the 9th of April 1991, the Applicant and his wife together with the First and Third Respondents met at the First Respondent's house at Ambu

Village for reconciliation purposes. There had been some friction between the parties and so they decided to meet together to settle those differences.

They prayed together, after which the documents were brought out for signing. It is the circumstances surrounding the signing of this document that is disputed by the Applicant.

In his evidence under oath, the Applicant stated that as he was leaving, the Third Respondent took out a piece of paper (the document) and told him to sign it. The First Respondent then gave him an eye glass to use. However, the glasses he said, did not fit his eyes.

Mr Sipisoa stated that he could not read and so could not understand what the document was about. He also stated that the Third Respondent did not explain to him what the contents of the documents were.

He only became aware that something was not right about 3 months later when the First Respondent went and marked the land.

He was not fully aware of the effect of the document he had signed until September of 1991 about 5 months later. This was when the Lands Officer at Auki went to mark out the boundaries of the land. He then wrote to them to query what they were doing and he was shown a copy of the document he had signed.

In contrast, the Third Respondent, Mr Nelson Ne'e, stated that the Applicant was given the document to read, but when he complained that he can only read with glasses, he was given a pair of glasses which he used.

Mr Ne'e stated that after the Applicant had read the document, he said that this was what he had been dreaming about. He then asked for a pen and signed the document. A copy of the document is annexed to the Applicant's affidavit, marked "**A**".

It is headed: "**POWER TO DEAL IN CUSTOMARY LAND**" and reads:

> "***WHEREAS I, JACK SIPISOA*** *of Gnalisagore Village the rightful chief and leader of the* ***AMBU LAND OWNING GROUP*** *have reached late age and* ***WHEREAS*** *I have this day decided that that part of my responsibility relating to the care and dealings in and with my group's customary land be given to some young members of the group and* ***WHEREAS*** *I have identified my kinsmen* ***PETER TAFEA NE'E*** *and* ***ALVIN IDUKELEMA*** *also of the Ambu Landowning Group as fit and suitable persons to* ***TAKE OVER*** *that part of my responsibility referred to herein* ***NOW THEREFORE I HEREBY AUTHORISE*** *the said* ***PETER TAFEA NE'E*** *and* ***ALVIN IDUKELEMA*** *to do such things or to perform such acts as they may deem appropriate to further*

*the interests of the Ambu Landowning Group which shall **INCLUDE** securing the land by registration either in the name of the Group or such part of the group as may best promote development on the said land."*

This is an interesting document. Whether it would be valid in custom or not would be interesting to note but that is a matter that I am not asked to consider and may not be able to anyway as the appropriate Court would seem to be the Local Court.

The impact of the document however is quite substantial. It gives power to the two persons, Tafea Ne'e and Alvin Idukelema to deal with customary land.

The Land and Titles Act defines the word "***dealing***" to include a disposition and transmission. A "***disposition***" in turn means "***any act inter vivos by an owner whereby his rights in or over the land comprised in his interest are affected, but does not include an agreement to transfer, lease or charge***". **(Section 2, Land and Titles Act).**

The legal effect of the document is that it gives power to the donees to be able to dispose of the customary interests for instance by sale ***provided***, it is in the interests of the Landowning group and that it would foster development on the said land.

I now turn to the defence of "***non est factum***".

This is an old common law defence and originally applied to those who could not read, whether through blindness or illiteracy. (***Halsbury's Laws of England,*** *4th Edition, paragraph 284*). It was then subsequently extended to include persons who could read and to all kinds of signed contracts.

I quote the relevant passage in paragraph 284:

"The basis of the defence is that the signatory is mistaken as to the nature of the transaction."

The general rule in law and I quote Daly CJ in the case of ***Maeaniani -v-Saemala*** *(1982) SILR at page 73,*:

"..... is that where a person, who is of full legal capacity, signs a document then it is binding upon him whether or not he has read it."

An exception to this is the defence of ***non est factum.***

In the case of ***Saunders -v-Anglia Building Society*** *[1970 3 All E.R. 961 at page 963* per Lord Reid had this to say:

"So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstance. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances; certainly not where his reason for not scrutinising the document before signing it was that he was busy or too lazy."

At paragraph 'g' he continued:

"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document."

If that person signs because he believed that that document had one character or effect but that it turns out to be different, then there must be some grounds for that belief (***Saunders -v-Anglia Building Society*** *(ibid) paragraph g*).

I now turn to the facts of this case.

The main thrust of the Applicant's submissions is that he is a man of little educational background and therefore has a limited understanding of the English language. He can read plans and measurements and simple instructions and correspondences as a carpenter, and can read his own language. However, when it comes to legal words and phrases and documents, he cannot read them.

I have heard and seen the Applicant give evidence. When he was asked in the witness box to read the heading of the document containing the power of appointment, he read out the words: "**Power to deal in Customary Land**".

In his own words when examined in chief he said:

"I can read with glasses and I can only read my language. The words used were words of law and so I could not mean it or understand it."

When he was cross-examined about the fact that he had just read in Court, he said: "***Some words, yes, others no.***"

On the night of the 9th April 1991, the Applicant was given a pair of glasses to read the document with because he had left his own at his home.

Mr Nelson Ne'e stated that the Applicant did not complain that the glasses did not fit. Instead, he commented that the document was what he had been dreaming about and asked for a pen to sign his name.

The Applicant did not ask for an explanation as to what the document meant or even hinted that he did not understand the contents thereof.

When he was asked why he did not ask, he said:

"I did not ask because after signing I and wife left. I just did not ask them before signing."

If one looks at the document itself, it can be noticed that apart from the legal jargon, such as the use of the words, "**whereas, hereon, hereby**" the actual words used in my opinion are quite common and simple words.

On weighing the circumstances of this particular case carefully, I am not convinced that the Applicant could not read or be able to read the document and to have a satisfactory understanding of the full import of the document.

His actions in my view were that of a man who knew what he was doing. He filled in the words "**Ngalisagore**" himself in the document, and signed the document in the space marked for his signature.

There is evidence from the First Respondent's affidavit at paragraphs 2 and 3 that he had had prior discussions with the applicant on the 1st of February 1991 about the power of appointment. It was following this discussion that the document was prepared by Mr Nori, counsel for the Second and Third Respondents. The Applicant would therefore have been aware of what the document was about.

Another important point to note is that there is hardly any evidence at all to support the belief of the Applicant that he was signing a different document. The only explanation given was that he had signed a document prior to this on a piggery or farm project and that he assumed that this related to that. I find his explanation most unsatisfactory.

Having weighed the circumstances of the Applicant, that he is a man from a rural background, a man of many years standing as a carpenter in the Government, a Chief in his community, I am satisfied that he knew what he was signing. I am also satisfied too that if he did not know or understand what the contents of the document were it was because he was content to sign without taking the trouble to try to find out at least the general effect of the document. The plea cannot be available to such a person.

In this particular case however, I am satisfied that there was proper consent on the part of the Applicant when he signed the document.

The defence of ***non est factum*** therefore must fail.

I now turn to consider the second ground.

Contrary to the submission of learned counsel for the Second and Third Respondents, who says that it is not necessary to have this document executed before a Commissioner for Oaths, the form in which the document is to be executed is quite significant and the manner of execution prescribed.

The document purports to make a power of appointment with legal consequences. This Court is not asked to rule on customary law and ownership and customary rights and powers. It is being asked to consider whether the power of appointment in the form of a declaration before a Commissioner for Oaths is valid or not. This comes within the equitable principles on powers of appointment and within the jurisdiction of this Court. The form in which the execution of the power is exercised, is aptly covered in "***Chesires Modern Real Property***", *10th Edition at page 200:*

> "*The instrument that creates a power may require that its exercise shall be attended by special formalities, and the general rule on this matter is that all such formalities, no matter how trivial and unessential, must be strictly observed.*" ***(Also in Sugden on Powers (6th Edition) page 264.***

Also in "***Halsbury's Laws of England*** *4th Edition at paragraph 863* it says:

> "..... *every circumstances required by an instrument creating a power to accompany its execution must be strictly observed.*"

The circumstance required in this particular document is that it be executed before a Commissioner for Oaths. This formality was not complied with. This is not disputed by both parties.

At paragraph 11 of the First Respondent's affidavit he stated that he took the document to Mr David Totorea, a Commissioner for Oaths to sign at the space provided in the document for the Commissioner for Oaths to sign on the following day, the 10th of April 1991. The document was not executed in the presence of the Commissioner for Oaths.

The power of appointment accordingly must fail on this defect in execution and form.

I now turn to item (3).

Purchasers for value without notice of the defective document are protected by equity. (***Chesires' Modern Real Property*** *10th Edition at page 202*).

It would therefore be unjust on such a bona fide purchaser for this Court to have his purchase rescinded and declared null and void without due consideration of his equitable rights.

Any sale and purchase in reliance upon the power of appointment contained in that document cannot automatically be declared null and void. I am aware that certain lands have been sold in reliance upon the document. If the Applicant wishes to pursue those sales then the purchasers must be given the opportunity to present their case.

Accordingly, the third item cannot be granted.

I make one further point before leaving this case.

The Applicant could easily have revoked his power of appointment when he first became aware of what he said was not his deed. Why he did not do that at the start is not known. There would have been no legal obstacles for him simply to execute a deed of revocation and put the matter to rest once and for all and have it served immediately on the Respondents. The power of appointment would then have ceased to have effect from that moment onwards.

That is now not necessary however as I have found that the power of appointment was defective.

Accordingly, I order that the document executed by the Applicant on the 9th April 1991 be declared null and void.

Costs to be borne by parties themselves.

(A. R. Palmer)
JUDGE