

TEVITA UHI

-v-

1. MANAGER TEPB
2. TONGA ELECTRIC POWER BOARD

BEFORE THE HON JUSTICE FINNIGAN

Counsel: Mr Hola for Appellant,  
Mr L Foliaki for Respondent.

Date of Hearing: 25 March 1999.

Date of Judgment: 23 April 1999.

### JUDGEMENT OF FINNIGAN, J

This is an appeal against a magistrate's decision. The appellant owns a retail store at Longolongo. A number of people have rented the store, the last being Sione Soakai. The power was disconnected when there were unpaid arrears of \$885.61. The appellant wished to reopen the store himself, and asked the respondent, the Power Board, to connect the power. The respondent would not do so unless the appellant paid the arrears. He agreed to do so, by a payment of \$400 plus the reconnection fee of \$5, with the balance at \$40 per month.

The appellant is disappointed with this bargain. He feels that he should not have to satisfy the contractual shortcomings of Sione Soakai and/or others. He has challenged his agreement with the respondent. That is a claim in contract. He claims also in tort, asserting that the respondent was negligent in allowing the arrears to mount up to \$885.61, when it was empowered to disconnect after 2 months of non-payment. He says it clearly had not done so, because the power usage could not have been \$400+ per month. In the Magistrate's Court he sought a declaration that he does not have owe \$885.61, and an order for refund of his \$400. For the claimed negligence he claimed \$1,000 in damages and costs.

The magistrate rejected the claim that the respondent had been negligent. About the contractual claim he said it seems unreasonable that the appellant should pay Sione Soakai's bill, but he noted that the power board had not come to him to pay it, he had gone to them. He concluded that the parties had made a valid agreement and gave judgment for the respondent.

### THE APPEAL

Mr Hola's argument was concise and clear. He argued that the appellant had not contracted for Sionne Soakai's bill, and should not have to pay it. He submitted that the appellant had agreed under duress. To further his argument he relied on the respondent's statutory powers and obligations. He relied first on Rule 4 of the Electric Power Board Rules (Cap 93, subsidiary legislation), which provide for an agreement between two parties in the presence of the respondent for transfer of liability, there being no such agreement in the present case. The liability provided for however is liability for installation, addition, alteration or removal of electrical wiring.

He relied on Rule 9, which gives the respondent the right to disconnect after 60 days' non-payment, but this Rule is limited also. It applies to non-payment for installations, additions, alterations and removals.

He relied on Rule 19, which provides that where a consumer ceases to be the occupier, no subsequent occupier shall be entitled to electricity supply until he has officially applied and has given any minimum guarantee that the respondent may require. He argued that it is fundamental to any contract like that in the present case, that the respondent is entitled by its own rules only to require and fix a guarantee, not to require payment of the arrears of a previous occupier.

He relied on Rule 21 as fundamental also. This provides that where a consumer ceases to be the occupier and owes money for power supplied, the sum owing shall remain a debt due and payable by that customer which may be recovered in any court of competent jurisdiction.

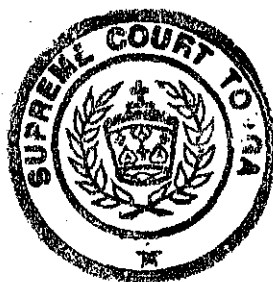
The first sentence of Mr Foliaki's submission in reply summed up the appellant's case. He submitted that the claim is that the agreement by the appellant to pay the arrears is invalid by reason of statutory duties. The appellant's case is not even that strong. What is provided for the respondent in the Rules is not statutory duties but statutory powers. The strong part of Mr Hola's argument might have been the Rules 19 and 21, had they imposed statutory obligations on the respondent. However, they only create powers, not obligations to use those powers.

The respondent when doing business is entitled to invoke those powers, but is not required by the Rules to do so. Rule 19 illustrates the point. When the respondent wished to enter into a new contract with the appellant, it was entitled to fix any (reasonable) minimum guarantee and require the appellant to give that guarantee before supplying power. It was also entitled to proceed, as it did in this case, without any

guarantee. Rule 21 likewise: the debt left behind by Sione Soakai remained a debt due and payable by him, and the respondent was able to sue for it. It was however not obliged to. It chose to ask the appellant to pay it, and the appellant agreed.

The first part of the appellant's case is that he agreed to pay Sione Soakai's arrears under duress. The evidence is that of the appellant himself and of two officers of the respondent whom he called as witnesses. None of these witnesses gave evidence that showed the appellant was deprived of choice about agreeing to pay the arrears. The appellant's evidence was that he went to the power board and they told him to deposit \$405 before they will connect the electricity. He did not have to agree to that. He could have taken legal advice about his position, and his lawyer could have pointed out to the respondent the provisions of Rules 19 and 21. But that did not occur. The appellant went ahead and gave his agreement. It is a principle of law that the courts must uphold agreements that people have chosen to make.

Having considered the submissions, I am satisfied that the magistrate was right, and the appeal must be declined. Costs are awarded to the respondent, to be agreed or taxed.



  
JUDGE

NUKU' ALOFA, 23 April 1999