IN THE SUPREME COURT OF TONGA **NO.C.1295/98**

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : ***ALLIED FOODS CO. LIMITED*** - ***Plaintiff;***

AND : ***ALWYN MOA*** - ***Defendant.***

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr D. Garrett for the plaintiff
Miss L Tonga for the defendant

Date of Hearing: 19 and 20 June 2000
Date of Judgment: 27 June 2000

Judgment

The plaintiff company is the owner of flourmills in New Zealand and the defendant was managing a bakery business in Neiafu, Vava'u at the time in question. There is no dispute that, in 1994, 1995 and 1996, the plaintiff shipped four consignments of flour to the defendant in Vava'u which he received.

The first was under an order number 20202 dated 2 November 1994 and invoiced at $11,760.00. This was followed by the other consignments as follows:

Order number 20397 dated 27 January 1995, value $12,096.00
Order number 21294 dated 15 March 1996, value $12,610.80
Order number 21534 dated 8 August 1996, value $12,584.00.

The defendant does not dispute that all these consignments were received by him and that he has not paid for them. The plaintiff brings this action to recover those costs.

The defendant accepts liability for the two later orders but pleads that the first two orders were the result of an arrangement he had with a Tongan trader, Peter Hala'api'api, in New Zealand whereby the defendant would ship a container of produce such as cassava to him and he would arrange a shipment of flour to the defendant as payment. His case is that the first two orders were made by Hala'api'api and, as far as the defendant was concerned, had been or were to be paid for by him.

It was pleaded by the plaintiff that the defendant had never challenged or questioned the amount owed on any of these four consignments. That is one of the issues in the case.

The plaintiff called a company accountant, Mr Heywood, who produced the invoices and other company documents. They show that the four shipments were made on the dates stated above and were not paid for. He had not been working for the company at the time of these transactions and could only give evidence of the present practice of the company and draw on his experience in accounting in similar businesses for 18 years. He was a helpful and clearly credible witness.

He explained that orders could and most frequently are made by telephone and are taken down and put onto the computer. That order is then produced as a packing list that is sent to the warehouse and the shipment arranged. He told the court that it is company policy that, if an order is delivered and not paid, no further orders would be taken until the payment issue is resolved. When and whether such action is taken depends, of course, on the terms of trade of that particular customer but, once he is outside the period allowed, that policy is implemented. Failure by a member of the plaintiff's staff to observe this rule is a "sackable" offence.

At the time of the relevant transactions, the branch manager of the plaintiff responsible for the Pacific was a Peter Murray. He has since left the company following a disagreement about the manner in which he ran the business especially the fact that he had allowed his customers in the islands to accumulate over a quarter of a million dollars in bad debts. Mr Heywood's searches through the company files had produced a few extra papers, including some correspondence, but it is clear that Mr Murray's filing and general office organisation was haphazard and disorganized. The defence produced some copies of other correspondence between Mr Murray and the defendant which Mr Heywood had not seen and which were clearly no longer in Mr Murray's files.

Mr. Heywood said that, when an order is received from a customer, a customer number is allocated to that person made up of the first three letters of the customer's name followed by a number. There were two such numbers issued to the defendant's account. The two disputed orders have the number MOA

130. All the others have the number EMO 130 based, it would appear, on the initial of the defendant's first name which is sometimes wrongly spelt in the correspondence as Elwyn instead of Alwyn.

The defendant gave evidence and told the court of the arrangement with Mr Hala'api'api. The plaintiff challenges such an arrangement could have been made and it was, to say the least, a very casual and ill-considered arrangement. The exact details seem never to have been clarified and it was never put into writing. However, be that as it may, the defendant insists that, when he received the containers of flour, he believed they had been ordered and arranged by Mr Hala'api'api under this arrangement. They were accompanied by an invoice and he was able to have them cleared by Customs in Neiafu on the strength of that invoice.

The first he knew to the contrary was when he received a statement from the company in late April 1995 referring to the two consignments that are the subject of dispute in this case. As soon as he received it, he contacted the company by facsimile and was put in touch with Mr Murray. That was he first time he had had any contact with him or the company. He told the court that he challenged the figure and said he was coming to New Zealand and would come and see Mr Murray then. In about June of that year, he saw him in Auckland. They discussed the debt and Mr Murray told him the consignments of flour had been ordered by Mr Hala'api'api. The defendant denied liability and explained the arrangement with Mr Hala'api'api. A further meeting was then arranged at Mr Murray's office to allow Mr Hala'api'api to attend. There were three people there at that time, the defendant, Mr Murray and Mr Hala'api'api.

The defendant's case is that they discussed the whole arrangement and he pointed out that he was not liable. Mr Hala'api'api spoke to him in Tongan at one stage and apologised for letting him down. Mr Murray was, understandably, concerned about the payment and asked the defendant to help Mr Hala'api'api with payment. The defendant said he would send no more cassava because he had sent four containers and only received two containers of flour back. However, he agreed to help to the extent that, if Mr Hala'api'api came to Vava'u, he would allow him to take his (the defendant's) breadfruit for no charge.

The defendant was keen to continue receiving flour from the plaintiff company and so he had a further meeting with Mr Murray who told him the procedure to set up such an agreement. A number of consignments including the third and fourth shipments were the result of that agreement.

The plaintiff was unable to call Mr Murray. He was clearly unwilling to assist the company more than the absolute minimum but he did speak over the

telephone to Heywood and on the strength of that an affidavit was drafted and sent to him for signature. That was produced as part of the plaintiff's case.

He stated that, in late 1995 and into 1996, both the defendant and Mr Hala'api'api owed money to the company. He understood both operated bakery businesses and also dealt with each other in Tongan vegetable products. It should be mentioned that the defendant disputes the fact that Mr Hala'api'api runs a bakery.

Mr Murray mentioned the debt Mr Hala'api'api owed as being $42,112. It is, as has been stated, not disputed that the defendant owes the plaintiff money on the later shipments shipped in March and August 1996. Had Mr Murray also stated the sum to which he recalled the defendant was indebted, it would have been possible to say whether it included the earlier shipments or was only the later ones, as the defendant admits. Unfortunately he did not.

He continued:

> "I recall that Moa told me that he had reached some private deal with Hala'api'api under which the former would supply the latter with some Tongan vegetables, and in return Hala'api'api would pay off some of Moa's debt with us. Because I was under some pressure to obtain payment wherever I could, I agreed to Moa's proposal. I would have accepted money from anyone who had offered it in reduction of either debt.
>
> At no stage was there any agreement, either verbally or in writing, that Hala'api'api would be responsible for Moa's debt. I always regarded the debts as separate and neither debtor indicated otherwise."

He referred to a number of faxed and telephone communications between himself and the two Tongans and produce two faxes dated 13 November 1995 and 16 February 1996.

The plaintiff's contention is that this is a clear case. The defendant received the flour. At the time, he received an invoice upon which he was named both as the recipient and the person who was to be invoiced. There is never any mention in any document of Mr Hala'api'api in relation to either shipment. Counsel for the plaintiff put it to the defendant that he had simply seen the discrepancies in the manner of billing these two consignments and taken the opportunity to avoid his clear liability to pay for both.

The defendant insists on the agreement with Mr Hala'api'api who, he says, ordered the flour. Thus, whilst he was the admitted recipient of the flour, he was not liable to pay the plaintiff.

In view of the defence pleaded, it is perhaps surprising that the defence did not seek to join Mr Hala'ap'api as a third party and that apparently neither side took any steps to call him. However, I must judge the matter on the evidence before me.

The evidence of both sides is unsatisfactory to some extent. The burden is on the plaintiff to prove on the balance of probability that there was an agreement between the plaintiff and the defendant for the supply of flour to the defendant for which the defendant would pay. Faced with such evidence, the burden of proving the alternative arrangement then shifts to the defence as the party asserting it.

As I have stated, the evidence of both sides is not wholly satisfactory but the burden lies first on the plaintiff to prove the agreement.

The plaintiff's evidence is clear and undisputed that the flour was ordered and delivered. Mr Heywood says that it would have been ordered by the defendant. The document he produced clearly names the defendant both at the assignee and as the person to be invoiced. He has told that orders are generally taken over the telephone and that would be how these were taken. That would explain why there is no other evidence of the placing of the order. He suggests, because it must be speculation by him, that the two customer numbers are simply either a clerical error or a way of allowing the defendant to sort out previous payment problems by starting, in effect, a new account. The mention of an agreement between the defendant and Mr Hala'api'api in the correspondence between himself and the defendant is simply an attempt by Mr Murray to get the defendant's debt cleared in some way.

On the total evidence produced, I cannot accept that the plaintiff has proved the agreement to supply the flour was made by the defendant rather than by Mr Hala'api'api. The agreement under which the defendant says this was done was, as I have already stated, vague and apparently uncertain. Had the burden been on the defendant to prove it, I may have needed more evidence in order to determine its existence or its exact scope but I must first decide whether the plaintiff has discharged its burden to establish the agreement.

The correspondence between Mr Murray and the defendant is incomplete and often imprecise but there is certainly evidence of some sort of agreement for the supply of rootcrops to New Zealand. On 13 November 1995, Mr Murray is wondering "how you and Peter Hala'api'api are getting on loading the breadfruit container which hopefully when it arrives will enable Peter to pay your old outstanding account".

The plaintiff points to the use of the phrase "your old outstanding account". There is no mention there of the liability being on anyone else and the

documents show that, from the outset, the defendant was named as the invoicing addressee. On the evidence before me, an equal explanation is that, if Mr Hala'api'api had ordered this over the 'phone and if, as Mr Murray points out, he was already indebted to the company for a substantial sum, he would probably have needed to use the defendant's name to have a telephoned order accepted. The defendant, it must be remembered, was at that time not indebted to the plaintiff at all. In those circumstances I do not consider the use of the phrase referred to advances the plaintiff's case.

It goes further. Mr Heywood gave his suggested explanation for the two customer numbers. The court has noted the apparent coincidence that it is the two disputed orders which have a different number from all the rest. An alternative suggestion to that of Mr Heywood is that they could have been used because the first two orders were in some different way from the rest. In that context, I note that the address of the consignee on each of the first two invoices is the same but differs from the remainder. The MOA130 orders are addressed to the defendant at "Neiafu Vavau" whilst the two admitted consignments are addressed to "Neiafu Vava'u and Beach". Such a difference could support the defendant's suggestion that the first two orders were made by a different person.

I have referred to Mr Heywood's suggestion that the two account numbers may have been a billing device to allow the defendant time to pay off a previous debt. I accept his evidence that such arrangements may be made but, in such a case, I would expect some written confirmation at least in the company papers. Nothing has been produced by the plaintiff to support such a suggestion apart from Mr Heywood's speculative view. If such an arrangement has not been proved to have taken place, it is a point in the defendant's favour that by the time Mr Murray sent the two admitted containers in March and August 1996, the two dispatched more than a year before had still not been paid. That would have been a remarkable step by any company let alone one with the policy of clearing old debts before allowing further orders as described by Mr Heywood.

The court was shown a letter from Mr Murray dated 8 August 1996 in which it is clear that the defendant was paying off his more recent orders with the plaintiff by monthly installments. Even at that stage, having referred to those payments by the defendant, Mr Murray writes:

> "I am still having problems with Peter Hala'api'api regarding your old account. I am disturbed that I am the one suffering regarding the settling of this account. Peter is now saying that the breadfruit etc is not available from Vavau to be shipped to Auckland. Would you please confirm that it is still your intention to give/supply to Peter Hala'api'api the product to ship to enable him to settle this large outstanding account of $17,572.00"

There is previous correspondence between them about payments for the later shipments but, apart from the reference to "your old account", there is never any apparent suggestion that the company policy required it to stop any fresh supplies until the old account was paid off. On the other hand, there is reference more than once to Mr Hala'api'api being the person who will pay it.

As I have said, the burden is first on the plaintiff to prove on the balance of probabilities that the defendant made the agreement with the plaintiff for the first two consignments before it shifts to the defendant to prove his arrangement with Mr Hala'api'api. The plaintiff's evidence depends on the invoices and statements. The defendant's suggestion that they were the result of an arrangement between Mr Hala'api'api and the company and not with him is supported in part by the correspondence between Murray and himself, by his evidence of his challenge to the bill on his visit to New Zealand, which I accept did occur, by the differences between those invoices and the succeeding ones and by the willingness of the company to continue to supply him with flour when the disputed accounts had been outstanding for such a long time.

The plaintiffs claim in relation to the first two consignments is dismissed. The defendant has admitted the later two consignments and so there shall be judgment for the plaintiff in the sum still outstanding and admitted by the defendant of $NZ14,129.76 only. The plaintiff also seeks interest at 10% per annum from the date of purchase. The plaintiff has been kept out of its money for a very long time despite the clear liability of the defendant to pay so I shall make that order

Costs would normally follow the event but I shall make no order. The defendant has succeeded in his challenge to the consignments he did not admit ordering but he relies on his suggested agreement with Hala'api'api. Had he joined him and had court accepted he was the person liable, the defendant would have had his costs paid by him and the plaintiff would have succeeded in getting judgment. Alternatively, the matter may have been resolved without needing to go to trial.

Therefore the order is judgment to the plaintiff in the sum of $NZ14,129.76 only with interest at 10% per annum from the date of consignment. No order for costs.

SUPREME COURT TONGA

NUKU'ALOFA: 27th June, 2000.

CHIEF JUSTICE