

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 24 of 2015**

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**BETWEEN: MA'ASI TAUELANGI**

**- Plaintiff**

**AND: VILISONI PAUL HEMALOTO (aka PAU'U  
HEMALOTO)**

**- Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel: Mr. S. Tu'utafaiva for the plaintiff  
Mrs. F. Vaihu for the defendant**

**Date of Hearing: 30 and 31 May 2016**

**Date of Ruling: 1 July 2016**

**RULING**

**The issues**

[1] This is a dispute over ownership of a Massey Ferguson 265 tractor ('the tractor'). The tractor was purchased in New Zealand in August 2013. It was paid for by the defendant, Vilisoni Paul Hemaloto (Vilisoni) and sent to Tonga for the plaintiff, Ma'asi Taelangi ('Ma'asi'), to cultivate his land. In February 2015 Vilisoni asked to use the tractor. Ma'asi gave him permission to do so but since then

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Vilisoni has refused to return the tractor and has registered it in his own name.

[2] Ma'asi claims that the tractor was a gift. He seeks the return of the tractor and a direction that it be registered in his name and costs. Vilisoni denies that the tractor was a gift. He accepts that the tractor was purchased for Ma'asi but says they had an agreement that Ma'asi was to send him containers of food to reimburse him for the purchase price. As the containers of food were never sent he has retained ownership of the tractor. Vilisoni has filed a counterclaim in which he seeks a declaration that he is the owner of the tractor.

[3] During closing submissions I raised with Counsel whether, should it be found that Vilisoni gifted the tractor to Ma'asi, the gift could be set aside in equity as being an unconscionable bargain or the result of undue influence. This was not pleaded by Vilisoni. Neither Counsel had considered the matter and I called for submissions. I have now received the submissions and will address this matter later in this ruling.

[4] The issues can be broadly stated as follows:

[4.1] Was the tractor a gift from Vilisoni to Ma'asi?

[4.2] If the tractor was not a gift, was there an agreement that Vilisoni was to receive containers of food as reimbursement of the purchase price?

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[4.3] If so, did Vilisoni retain ownership of the tractor until the containers of food were received?

[4.4] If the tractor was a gift should the gift be set aside in equity

**The facts**

[5] 'Ofa Taelangi is Ma'asi's brother and a Catholic Priest. I will refer to him as Father Taelangi although I understand he is presently taking time out from his religious duties.

[6] In 2013, Father Taelangi was serving as an assistant priest in a Catholic Church in Auckland, a position which he held for five years until September 2014. Vilisoni and his wife, Malia Hemaloto ('Malia'), had lived in New Zealand for approximately 30 years until returning to Tonga in 2015 and were members of Father Taelangi's church. On all accounts, they were devoted parishioners and shared a close relationship with Father Taelangi. Both said that Father Taelangi was welcome at their home and he frequently visited and received assistance from Vilisoni and Malia. They cooked meals for him, did washing and let him rest at their home and watch television. The evidence suggests that Vilisoni and Ma'asi were acutely aware of Father Taelangi's position in the church and held a strong belief that it was their responsibility to care for him in any way they were able to. At some stage, Vilisoni and Malia became aware that Father Taelangi's family in Tonga required financial assistance from him and expressed their general willingness to help Father Taelangi and his family.

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[7] On or about 24 July 2013, Ma'asi travelled from Tonga to New Zealand with the intention of obtaining a tractor and returning with it to Tonga. He said that he had previously discussed this with his brother as a way to generate food and an income for his family in Tonga. He had no money for a tractor and was entirely dependent on Father Taelangi to purchase the tractor.

[8] It appears that, aware of Ma'asi having arrived in New Zealand, Vilisoni asked Father Taelangi whether Ma'asi needed anything. Father Taelangi told Vilisoni that his brother was a hard-worker and was able to grow crops to feed his family and sell in Tonga, but needed a tractor in order to do so. During a visit to Vilisoni's house, Father Taelangi looked on TradeMe and found a Leyland tractor for sale with a reserve price of NZ\$4,000. It was thought this could be purchased for NZ\$7,000 but where that figure came from was never properly explained to me. It is unclear whether Ma'asi was present. However both Ma'asi and Father Taelangi gave evidence that although they intended to buy the Leyland tractor, and Father Taelangi said he had the money to do so, Vilisoni talked them out of it and said the Leyland tractor was not good enough. Their evidence was that Vilisoni said that Ma'asi should help him with some painting work at his home and he would purchase him a better tractor.

[9] Malia gave evidence that she agreed with Vilisoni that they would purchase the Leyland tractor for Ma'asi. However she said she was concerned about doing so due to the added pressure that would be placed on her to increase her work hours so that she could provide for her own family as she and Vilisoni have six children of their own.

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Vilisoni was retired, although I understand on receipt of compensation due to an injury sustained at work.

[10] Vilisoni and Malia gave evidence that they invited Father Taelangi and Ma'asi to their house for dinner. This was before the tractor was purchased. Vilisoni said that during the evening he, Ma'asi and Father Taelangi discussed the arrangement in greater detail. Malia heard only parts of the conversation from the kitchen. Vilisoni said that he, Father Taelangi and Ma'asi agreed that he would purchase a tractor for Ma'asi in return for the shipment of containers of crops back to Vilisoni in New Zealand in late 2014. It is not clear how many containers were to be sent to Vilisoni, who seemed to believe that there would be one or two containers which he would sell, keeping enough of the proceeds to reimburse himself for the purchase price of the tractor and send the remaining funds back to Father Taelangi's family. He also said that Father Taelangi was aware that he was in the process of painting part of the interior of his house at the time, and arranged for Ma'asi to go to his house the next day to assist him. Both Ma'asi and Taelangi resolutely deny that there was any discussion or agreement regarding containers of crops. They say that Father Taelangi said he would purchase the Leyland tractor and it was only because of Vilisoni's persistence that Ma'asi and Father Taelangi agreed to let him help to purchase a tractor. As noted they say it was Vilisoni who asked that Ma'asi help with the painting and Ma'asi did go to Vilisoni's house and assist with some painting but it was probably for no more than a day or two.

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[11] There is no dispute that at some later stage it was Vilisoni who suggested that Ma'asi and Father Taelangi go with him to the Tractor Centre at Pukekohe to look at suitable tractors. They went on 30 August 2013. It was there that the three men saw the Massey Ferguson tractor. After the tractor was taken for a test-drive, Ma'asi and Father Taelangi stated that they liked the tractor and the decision was made that they would purchase it. The price was NZ\$15,000.00. New tyres were also purchased at a price of NZ\$1,350.00. Father Taelangi said he told Vilisoni that he wished to pay part of the purchase price and cost of the tyres but allowed Vilisoni to pay it in whole because of his insistence that he would do so. Ma'asi's evidence is to the same effect.

[12] Vilisoni stated that he purchased the tractor as he felt he could not tell Father Taelangi that they needed to look for a different, less expensive tractor. He also said that he thought he would be able to get reimbursed from the crops he was to receive. The invoice and receipt for the tractor was made out in the name of 'Ofa Taelangi (Father Taelangi). Vilisoni claims that Father Taelangi signed the purchase papers while he was looking at the tyres, but did not object to this when he realised. The tractor stayed at the Tractor Centre for another three to four weeks to be repainted, which Father Taelangi paid for at a cost of NZD\$2,000.00. Father Taelangi claims that during this time he spent a further NZD\$3,600.00 for further maintenance works to be carried out on the tractor.

[13] The tractor was then transported to Tonga in a container provided by Maika Haupeakui, an uncle of Ma'asi and Father Taelangi and

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arrived in Nuku'alofa on 4 November 2013. In his bundle of documents Ma'asi provided invoices dated 5 November 2013, which he paid, from the Tongan Ministry of Revenue and Customs and Dateline. Ma'asi took possession of the tractor sometime after this date but never registered the tractor.

[14] Vilisoni said that he returned to Tonga on a number of occasions between November 2013 and his relocation to Tonga in 2015. This included a visit in December 2013 and three visits during 2014. He stated that on each occasion he visited Ma'asi and he observed that the tractor had been used only to transport material to Ma'asi's property but had not been used to cultivate any land or grow crops. When he asked Ma'asi about this, Ma'asi responded that he did not have the necessary ploughing equipment to use the tractor to cultivate land. Vilisoni claimed that on one of these occasions he asked Ma'asi about the containers of crops and when he would receive them, to which Ma'asi responded by requesting a further sum of money to put towards clearing trees on his property. Vilisoni refused to give him the money.

[15] In early 2015, Vilisoni and Malia relocated to Ma'ufanga. On or about 16 February 2015, Vilisoni again went to Ma'asi's house, this time to ask if he could borrow the tractor to mow lawns on the property of the Noble Fakafanua. Ma'asi and his parents agreed to this. However Vilisoni did not return the tractor and continues to hold it. He has also registered it in his name. Ma'asi said Vilisoni ignored his repeated requests for the return of the tractor.

[16] During the trial, Vilisoni stated that when he took possession of the tractor he purchased ploughing equipment and has since been able to cultivate 40 acres of land and grow enough cassava to send a container to Australia and to sell food at a market in Tonga each day. He said that he has employed three workers whose wages he has paid with the income generated by the use of the tractor.

**Credibility of the witnesses**

[17] There are disputes between the parties as to the circumstances surrounding the purchase of the tractor and, importantly, whether there was any agreement that Ma'asi would send containers of crops to Vilisoni. I should say something of my assessment of the credibility of the witnesses.

[18] Ma'asi did not provide plausible responses to some questions asked during his cross-examination. For instance, he was unable or unwilling to say whether TOP\$20,000.00 was a substantial amount of money in reference to the amount of his annual salary (which is a much smaller amount). He provided inconsistent evidence regarding the time he spent painting Vilisoni's house, stating first that he worked for a period of one or two weeks and then on further cross-examination that it was for approximately three or four days. On several occasions he stated that his intention had been to start using the tractor but that Vilisoni had then taken the tractor from his land. However, he provided no evidence of any steps he had taken to acquire the equipment he claimed was necessary to operate the tractor. On the whole I found Ma'asi to a guarded but not a dishonest witness.



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[19] Father Taelangi was an uncooperative witness but I do not consider he was dishonest either. He was however evasive on occasions and if he did not like questions put to him he would avoid answering them or answer them with a question. I do not accept what Father Taelangi said that he felt pressured by Vilisoni to let him purchase the tractor. My experience of him is such that he could easily have refused Vilisoni's offer had he wished to do so. Sadly for a man in his position, Father Taelangi seemed quite willing to benefit his family in Tonga at the expense of Vilisoni and Malia.

[20] Vilisoni and Malia both gave evidence. I have no doubt Malia was an honest witness but she could say little that was relevant to this proceeding except as to the depth of her relationship with Father Taelangi. Vilisoni however was not a good witness. His evidence was unclear and confused on the important matters such as in relation to his explanation of the amount that he had told Father Taelangi and Ma'asi he was prepared to pay for the tractor and also as to what exactly was agreed about the sending of crops. Vilisoni stated in his brief of evidence that Ma'asi was a stranger to him, which clearly was not the case as it is not disputed that he had painted Vilisoni's house. He also stated that the purchasing of the tractor was not a big deal for him when clearly it was. Vilisoni became emotional and defensive at times also. I believe that this was because of his understandable extreme disappointment that his generosity to Ma'asi and his family has been so badly abused rather than out of any attempt to mislead the court. However his emotion has I believe distorted his view of what actually occurred. On the whole where there is a conflict in the evidence I prefer the evidence

of Ma'asi and Father Taelangi over the evidence of Vilisoni because it simply seems more plausible in the circumstances of the case.

**Was the tractor a gift**

[21] Mr. Tu'utafaiva submitted that the tractor was purchased and given to Ma'asi as a gift with no arrangement for repayment by crops or otherwise. He argued that the parties never agreed that containers of crops would be sent to Vilisoni and that the painting work Ma'asi did was not an exchange of services for the tractor, but simply a sign of Ma'asi's appreciation for the gift.

[22] Mrs. Vaihu submitted that the tractor was not a gift and was given in return for crops. She accepted that if the Court felt the tractor was a gift then that was an end of the matter and Ma'asi must succeed on his claim. Unfortunately the statement of counterclaim pleads that the tractor was a gift. Mrs Vaihu sought to amend the word "gift" (at [18]) which she said describe only the feeling with which the tractor was given to Ma'asi and not the circumstances of the arrangement for the purchase of the tractor.

[23] Property is gifted by one person (donor) to another (donee) when the donor voluntarily and gratuitously transfers the property to the donee without receiving consideration and with no intention that the property will be returned to them (*Berry v Warnett (Inspector of Taxes)* [1980] 3 All ER 798 at 811). A gift of property is effective when the donor intends it to be gifted and the donee receives the property; there can be no gift without the giving and taking of property (*Cochrane v Moore* [1980] 25 QBD 57 (CA) at 76).

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[24] It is necessary to examine Vilisoni's intentions as a gift will only be effective where it is intended to be gifted by the donor (*Meisels v Lichtman* [2008] EWHC 661 (QB) at [71]). Vilisoni claimed that he purchased the tractor for Ma'asi on the understanding that he would receive crops that had been grown using the tractor. He stated that he did not intend for Ma'asi to retain the tractor if this did not occur. Vilisoni's evidence about what was discussed was cursory and unsatisfactory. He said that the matter was discussed at the dinner table but even if that was so, and Ma'asi and Father Taelangi deny it is so, I do not believe that in the circumstances anyone, including Vilisoni, would have taken those discussions as imposing a legal obligation on Ma'asi to send crops. Vilisoni's relationship with Father Taelangi was close and his intention in offering to buy the tractor was entirely unconditional in my view.

[25] Malia's evidence does not assist because she admittedly did not hear what was discussed except she said that there were references to tax allotments. I have no doubt that she is correct as there clearly must have been discussions between Vilisoni and the other two men about how Ma'asi would use the tractor and how it would benefit his family.

[26] Of particular importance is Vilisoni's evidence that if he had not received the containers of food but had seen that the tractor was being used as he had imagined, he would not have taken the action he did. This statement accords with my overall impression of Vilisoni and assessment of his motivation for purchasing the tractor. Vilisoni sought to assist Father Taelangi and understood that purchasing a tractor for his brother would relieve many of the

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pressures placed on him by his family in Tonga. The receipt of containers of food grown using the tractor was not a condition of that.

[27] I find that on the balance of the evidence presented to me the tractor was gifted by Vilisoni to Ma'asi.

**Are there grounds to support the setting aside of the arrangement in equity?**

[28] My finding above makes it unnecessary for me to decide the issues in paragraph [4.2] and [4.2] but it does leave outstanding the issue of whether the Court may set aside the gift in equity. Although I have decided that I should not do so I will say something about the law which will help explain the conclusion I have reached.

[29] It is well established that a Court may rely on its equitable jurisdiction to set aside a transaction that it considers to be unfair on the grounds of undue influence or an unconscionable bargain (*Buttress v Johnson* (1936) 56 CLR 113, 134; *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447, 461, 474; *O'Rorke v Bolingbroke* (1877) 2 AC 814, 822-3). In *Louth v Diprose* (1992) 175 CLR 621 at page 627, Brennan J described the common basis of the two doctrines as follows:

They both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property. Gifts obtained by unconscionable

conduct and gifts obtained by undue influence are set aside by equity on substantially the same basis.

[30] Both doctrines are applied to ensure that transactions do not unjustly enrich one party at the expense of the other. Nevertheless, Mason J expressed the difference between the two doctrines in the Australian case of *Amadio* at page 461 in the following terms:

Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

[31] In the case of unconscionable dealings, the Court's enquiry is focused on the stronger party's conduct in attempting to take advantage of the disadvantageous position of the other party to the transaction. In the *Amadio* case at page 474, Deane J found that the following matters must be established for a transaction to be considered unconscionable:

(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident

to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it.

If this can be shown, the stronger party will have the burden of proving that nevertheless, the particular transaction was fair, just and reasonable (*Fry v Lane* (1888) 40 ChD 312, 322).. If they are unable to do so and it is possible for the parties to be placed in their original positions, the Court may set aside the transaction.

[32] The basis of the Court's jurisdiction to intervene in cases where undue influence arises was described by Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 at page 134 in the following way:

The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter.

The doctrine is used by Courts to ensure that people are protected "from being forced, tricked or misled in any way by others into parting with their property" (*Allcard v Skinner* (1887) 36 ChD 145 (CA) at pages 182-3).

[33] Undue influence can take two forms (*Johnson v Buttress* at page 134). The first form arises in transactions when one party actually

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uses their position to take advantage of another party and influence them to enter into the transaction. In the second form, there is a presumption that undue influence exists because of the type of relationship between the parties and the nature of the particular transaction as one not ordinarily expected between parties in that relationship (*Allcard*, 185; *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773, 798-800).

[34] Established categories of presumed undue influence include but are not limited to that of parent and child (*Lancashire Loans v Black* [1934] 1 KB 380) and solicitor and client (*Hatch v Hatch* (1804) 9 Ves 292). Of relevance to the present case is the presumed undue influence category of religious superior and member (*Allcard v Skinner*).

[35] Until 2013 there was English case authority to the effect that the doctrine of unconscionable bargains did not apply in cases involving gifts (*Langton v Langton* [1995] 2 FLR 890). However, that approach was not followed by Keyser J in *Evans v Lloyd* [2013] EWHC 1725 (Ch).

[36] In *Allcard v Skinner*, it was held that the presumption of undue influence attaches to relationships of religious influence. This is of course important in this case because there is no doubt that Vilisoni's decision to make a gift of the tractor was due in large part because of Father Taelangi's position as his priest. In *Allcard*, Lindley LJ described the nature of the relationship, going so far as to state at page 183 that:

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...the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence.

[37] The presumption can be rebutted if it can be shown that the allegedly stronger party "took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee" (*Johnson v Buttress* at page 135). The Court must be satisfied that the gift was the result of the donor's independent will; it is not enough to show that the donor understood the transaction (*Allcard v Skinner* at page 171). The burden of proving this to the Court rests with the donee (*Curtis v Curtis* [2011] EWCA Civ 1602).

[38] While such an assessment must necessarily take account of the particular circumstances arising in each case, the English and Australian courts have identified a number of factors that are of particular relevance. Evidence that the donor received independent advice prior to making the gift is not essential to rebut the presumption and will be given different weighting depending on the circumstances of the case (*Haskew v Equity Trustees, Executors and Agency Co Ltd* (1919) 27 CLR 231, 235). For instance, there is Australian authority that undue influence may still be found to have existed even if independent advice was received if it does not



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appear to have affected the transaction (*Linderstam v Barnett* (1915) 19 CLR 528). Both the conduct of the donee and the fact that they did not receive any personal benefit from the transaction have also been noted as potentially relevant considerations (*Allcard v Skinner* per Cotton LJ; *Cheese v Thomas* (1994) 1 WLR 129, 138).

[39] Turning to this case, I have decided that it would not be just to allow Vilisoni to rely on equitable principles to challenge the gift. He did not rely on them in his statement of defence and counterclaim or in the case that he presented to the court. Whilst this court will, so as to do justice between parties, often take a less rigid approach to matters of pleading than might be expected in other jurisdictions a line has to be drawn somewhere. The court's leniency cannot extend in this case to allowing Vilisoni raise a previously unrecognised counterclaim after the conclusion of the evidence.

[40] Both Vilisoni's defence and counterclaim were incongruous with any reliance on the equitable principles to which I have referred. His case was that he was to be reimbursed in full for the money he contributed to the purchase price of the tractor. That tends to negate any suggestion of unconsonability or undue influence.

[41] It is now clear to me that there would be real prejudice to Ma'asi in allowing these matters to be raised. This prejudice arises for two reasons. First, Mr Tu'utafaiva's approach to this case was to emphasis the closeness of the relationship between Vilisoni and Father Taelangi to provide justification for the gift. If

unconscionability or undue influence had been raised he might well have decided to run the plaintiff's case on a different basis altogether. Secondly, in the circumstance of this case, particularly the relationship between Father Taelangi and Vilisoni, a presumption of undue influence will arise which Ma'asi would need to rebut. His case was not prepared on that basis. It cannot be fair that he be expected to satisfy an onus that was not known to him at the outset of the trial.

**Result**

[42] Ma'asi is successful. I find that the tractor was a gift to him and he is the owner of it. Vilisoni is to return the tractor to Ma'asi within 14 days of the date of this ruling. I also direct that Vilisoni is to cooperate to provide for a transfer or registration of ownership of the tractor in Ma'asi's name.

[43] Vilisoni's counterclaim is dismissed.

[44] In relation to costs, Ma'asi has obtained much from the generosity of Vilisoni. It may well be that upon reflection the parties feel that it is not necessary for me to make any determination on costs. However, if any party wishes to apply for costs they may file a memorandum within 14 days with 7 days for any reply.

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O.G. Paulsen

**NUKU'ALOFA:1 July 2016**

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