IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 1/96

BETWEEN: PELEIUPU NIFO of Moataa, Builder doing business as ENSIGN CONSTRUCTION:

Plaintiff

A N D: PYRAMID ENTERPRISES LIMITED a duly incorporated company having its office at Vaitoloa and carrying on business as Building Contractors:

Defendant

Counsel: R T Faaiuaso for plaintiff
TRS Toailoa for defendant

Hearing: 22 April 1997

Judgment: 28 April 1997

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JUDGMENT OF SAPOLU, CJ

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When this case was called for hearing, the plaintiff and his counsel appeared and informed the Court that they were ready to proceed. On the other hand, only counsel for the defendant appeared but no witnesses for the defendant. Counsel for the defendant then made application for an adjournment of the hearing of this case. The reason, as counsel for the defendant told the Court was that his attempts to contact the defendant in American Samoa regarding this hearing had been without success.

The Court denied the application for an adjournment. In the first place, the Court had been informed during at least three call-overs that the parties were ready to proceed with the hearing of this case. An application for a fixture date stating that the parties were ready for a fixture was jointly filed by both counsel in August 1996 and the Registrar by notice dated 1 October 1996 informed both counsel that 22 April 1997 had been set for the hearing of this case. Moreover if the case is adjourned, it would be quite a long time before it could come up for hearing again. And finally, the plaintiff and his counsel have come to Court ready to proceed.

Counsel for the defendant then made application for the opportunity to cross-examine the plaintiff and any witness to be called to testify for the plaintiff. That application was granted. As it turned out, only the plaintiff testified in support of his claim and he was cross-examined in detail by counsel for the defendant.

Now this is essentially a case on building contract. The plaintiff is a builder and carries on business under the name of Ensign Construction. The defendant is a company called Pyramid Enterprises Ltd and carries on business as building contractors in American Samoa and Western Samoa. Apparently the plaintiff is well acquainted with the principal personalities in the defendant company. He is now claiming from the defendant damages/compensation for two building projects at Nafanua and Taelefaga, for the hire and use of his truck by the defendant, for equipment and materials taken by the defendant, for tools and equipment confiscated in connection with the Taelefaga project, and for nightwatchman's wages. For clarity and in order to avoid confusion, I will deal

with each of those claims separately.

Nafanua building project:

According to the evidence which was adduced by the plaintiff, he was requested by a representative of the defendant in or about March 1995 to do some building constrcution work at Nafanua on a sub-contract basis. On 13 March 1995 a contract was signed between the plaintif and the defendant for the Nafanua project. Under the terms of the contract the defendant was the contractor and the plaintiff was the sub-contractor. The contractual relationship between the defendant and the plaintiff was therefore one of contractor and sub-contractor.

The contract was a lump sum contract for a fixed price of $4,500. Payment of the contract price was to be by interim payments made by the defendant to the plaintiff at the 25%, 50% and 75% completion stages of the project. The remaining 25% of the contract price was to be retention money, that is, money retained by the defendant as contractor until final inspection and acceptance of the project by the building owner, then it would be paid over to the plaintiff as sub-contractor.

The contract also provided that the defendant as contractor was to supply all the building materials required for the project in a timely manner and to pay the contract price to the plaintiff as sub-contractor for labour and equipment costs for the completion of the project as per specifications and drawings. The contract, moreover, required that all phases of the project must meet with the approval of a government building inspector or the owner.

It appears from the plaintiff's evidence that he was only required to build the boxes and footings for the posts and the roof of the house at Nafanua. Another builder was to erect the posts. The plaintiff and his workmen then built the boxes and the footings including the slabs on which the posts were to stand. As there was a concrete foundation at the site where the new house was to be built, the plaintiff and his workmen had to crack parts of that concrete foundation in order to build the footings and lay the slabs for the posts of the new house. The government building inspector who inspected that part of the work approved of it. However, in cross-examination, counsel for the defendant raised the issue that the anchor bolts used in the footings to hold down the posts were shorter in size than those specified in the project specifications and drawings. The plaintiff's explanation was that when the cement truck came to pour the cement into the boxes, a representative of the defendant instructed him to use the anchor bolts which were then available on the work-site as the cemenet truck was only available for that day to pour the cement.

I am of the view that the plaintiff should not be liable to the defendant for any reduction in the contract price for any faulty workmanship due to the use of anchor bolts which did not correspond in size with those provided in the specifications and drawings. In the first place, it was the defendant's obligation under the contract with the plaintiff to supply all the required building materials for the project. That must mean building materials as provided in the project specifications and drawings. Anchor bolts are building materials. They must have, therefore, been supplied by the defendant. Secondly, it was the defendant through its relevant representative which instructed the plaintiff to use the anchor bolts which were in fact used. And, thirdly, in

supplying the anchor bolts and instructing the plaintiff to use those anchor bolts, the defendant cannot be said to have placed reliance on the skill and judgment of the plaintiff as a builder, because not only was it the defendant's obligation under the contract to supply building materials, but the defendant is itself a company of building contractors. As such, one would reasonably expect the defendant to have had the necessary skill and expertise required to determine whether the anchor bolts it supplied corresponded with the specifications and drawings and fit for the purpose for which they were required. Furthermore, the defendant should not have instructed the plaintiff to use those anchor bolts, even if the day the cement truck came to the work-site was the only day that truck was avilable to pour the cement. The defendant, therefore, cannot complain that the plaintiff used anchor bolts of the wrong size.

After the boxes and the footings for the posts had been built, the plaintiff and his workmen left the work-site as it was for another builder to come in and erect the posts. The plaintiff testified that he wanted to return to build the roof of the house as originally agreed to with the defendant, but he was never asked by the defendant to return to the work-site to do the roof. Instead he was paid $1,000. The plaintiff now claims under the contract that he should be paid half (50%) of the contract price as the work he had completed was half of the work he was required to do. In my view this claim should be allowed.

Half of the contract price is $2,750. The plaintiff had already been paid $1,000. I would therefore allow this claim in the sum of $1,750.

Taelefaga building project:

In March 1995, after completion of the boxes and footings for the posts of the Nafanua project, the plaintiff testified that the defendant again requested him to do building construction work at Taelefaga on a sub-contract basis. On 20 March 1995, the plaintiff and the defendant signed a contract for that project. Under that contract, the defendant was again the contractor and the plainitff the sub-contractor. The contract was another lump sum contract for a fixed price of $9,000. Payment of the contract price was to be by interim payments made by the defendant to the plaintiff at the 25%, 50% and 75% completion stages of the project. The remaining 25% of the contract price was to be retention money to be retained by the defendant until final inspection and acceptance of the project by the owner.

The defendant as contractor was, under the terms of the contract, also required to supply all the required building materials in a timely manner and to pay the plaintiff as sub-contractor the contract price for labour and equipment costs to complete the project as per specifications and drawings. All phases of the project were also to be approved by a government building inspector or the owner.

According to the plaintiff's evidence, when talks were held between himself and a representative of the defendant company for the construction of the Taelefaga project, it was the understanding between the parties that construction of the project would take four weeks. However, when the boxes for the foundation of the house were completed, the defendant had not supplied the stones and sand for the foundation. When the plaintiff asked the defendant about the stones for

the foundation he was told to request the matais of Taelefaga for their village to supply the stones. The village was accordingly requested and they supplied seven loads of stones and seven loads of sand at $15 per load on a hired pick-up vehicle. The defendant whose contractual obligation it was to supply the building materials did not pay for those loads, and neither did the plaintiff who had no contractual obligation to supply building materials. It took two weeks or ten working days to complete the boxes for the foundation and for the stones and sand to be supplied. It would appear that the defendant by not supplying the stones and sand for the foundation of the house had failed to honour its contractual obligation of supplying building materials. Be that as it may, the plaintiff said that he and his workmen then waited for another week or five working days for the cement truck which the defendant was supposed to send to pour the cement for the foundation of the house but no truck turned up. A representative of the defendant company then told the plaintiff that the cement truck could not come to Taelefaga. The plaintiff further testified that the site of the house to be built was not flat but sloping so that part of the foundation was deep because of the slope. The defendant was to send a loader to fill in the deep side of the foundation with soil but the loader never came. Thus it would further appear that the defendant was again failing to honour its contractual obligation of supplying building materials.

As a consequence, the plaintiff was faced with the difficulty that at the end of three weeks he had still not received any payment from the defendant. As he had only completed 15% of the project by that time, he could not obtain any payment under the express terms of the contract which provide for pro rata interim payments at the 25%, 50% and 75% completion stages of the project. But

the plaintiff had to pay his eight workmen and himself. The plaintiff also said that a representative of the defendant told him he would not be paid as he had done a bad job of the Nafanua project. I have already dealt with the Nafanua project and I need not reiterate what I have already said regarding that project except to say that on the evidence the defendant was not justified in refusing payment to the plaintiff for the Taelefaga project because of what had happened at the Nafanua project.

In my view the defendant's conduct and its failure to honour its contractual obligation of supplying all the required building materials in a timely manner caused the plaintiff to leave the work-site at Taelefaga and prevented the plaintiff from completing the construction of the house at Taelefaga. The plaintiff had performed part of the contract and when he left the work-site the benefit of the work he had performed was left behind with the defendant as contractor. In these circumstances, I am of the clear view that on the basis of what was formerly known as a claim on quantum meruit or quasi-contract, but now subsumed under the modern law of restitution and its unifying concept of unjust enrichment, the plaintiff's claim for 15% of the contract price for that same proportion of the project which he had performed should be allowed.

I would therefore allow the plaintiff the sum of $1,350 being 15% of the contract price for the 15% proportion of the project he had completed.

Claim for tools and equipment:

As the plaintiff and his workmen had to go to their homes for a weekend during the construction of the Taelefaga project, the plaintiff asked the

defendant for a nightwatchman to look after the work-site during their absence. The defendant replied that the plaintiff hired a member of Taelefaga village to act as nightwatchman. That was done but the nightwatchman wanted $150 for his service. Neither the plaintiff nor the defendant paid the nightwatchman. When the plaintiff and his workmen were about to leave the work-site at the end of three weeks, people of Taelefaga seized part of the plaintiff's tools and equipment of up to $400 in total value as compensation for the nightwatchman's unpaid wages and for the unpaid loads of stones and sand. The plaintiff now claims the value of those tools and equipment.

I have decided not to allow any claim for the value of the tools and equipment relating to the amount of the nightwatchman's unpaid wages, as I am not satisfied that such a claim has been established. The reason is that it is not clear which party should have paid for the nightwatchman's wages. It was also the plaintiff's contractual obligation to provide the labour for the Taelefaga project, and one would be inclined to think that labour would include the service of a nightwatchman.

As for part of the claim relating to the seizure of the plaintiff's tools and equipment by the village of Taelefaga to pay for the price of the unpaid loads of stones and sand they had supplied, I would allow $210 for that part of the claim as that is the total value of the fourteen loads of stones and sand at $15 per load supplied by the village of Taelefaga to the construction of the project. In a real sense, the people of Taelefaga had been paid for the stones and sand they supplied, with part of the plaintiff's tools and equipment they had seized. But it was the defendant's contractual obligation to supply building

materials. The benefit or value of the stones and sand supplied remained with the defendant as contractor when the plaintiff left the work-site at the end of three weeks. In my view the defendant should pay the plaintiff for the value of those stones and sand which have been compensated with part of the plaintiff's tools and equipment seized by the people of Taelefaga.

I would allow the plaintiff the sum of $210 under this claim.

Claim for use of truck:

The plaintiff also claims from the defendant the sum of $6,025 for the use of his truck by the defendant in its business operation from March to April 1995. This usage of the plaintiff's truck included the use of the truck to carry loads from Savaii to Upolu. The plaintiff testified that as a condition of the use of his truck, the defendant was to provide the diesel and battery for the truck and when the truck was to be taken to Savaii the defendant was also to pay for the transportation costs to and from Savaii. The understanding was that the defendant was also to pay the plaintiff for the use of the truck. Given the business nature of the relationship between the parties that would be a reasonable inference to draw. At least there is nothing in the evidence to suggest that the defendant's use of the truck was to be free or was a gratuitous gift from the plaintiff.

The invoices produced by the plaintiff show that the amount owing for the use of his truck by the defendant is $6,025. However, the plaintiff in the course of his evidence agreed to deduct the sum of $900 from his claim for the defendant's contribution to the use of the truck by way of providing the diesel

and battery for the truck when it used it and for transportation costs to and from Savaii. Counsel for the defendant raised other matters to be also taken into consideration.

After some consideration, I would deduct $1,000 and allow the plaintiff the sum of $5,025 for this claim.

Claim for table saw:

The plaintiff also claims from the defendant the sum of $2,500 being the value of his table saw which the defendant took in 1995 for use in its business operation and which has not been returned. It now appears that the owners of the defendant company have gone to American Samoa.

The plaintiff testified that he purchased that table saw in 1993 at the price of $2,500 but the table saw was not often used. Counsel for the plaintiff quite properly agreed that some allowance should be made to the value of the table saw for depreciation. Given the evidence by the plaintiff that the table saw was not often used, I would allow 15% depreciation on the purchased value of the table saw for the period 1993 to 1995.

I would therefore allow the sum of $2,125 for this claim.

Claim for roofing iron:

I would allow the full amount of $350 claimed against the defendant for the plaintiff's roofing iron as that claim has been established by the evidence.

Claim for timber:

I would also allow the full amount of $100 claimed against the defendant for the plaintiff's timber as that claim has also been established by the evidence.

Claim for nightwatchman's wages:

As I have already indicated, this claim for $150 for the nightwatchman's unpaid wages has not been established. It was not clear from the evidence whose obligation it was to provide for a nightwatchman and paid for his wages. One thing is clear from the terms of the contract and that is, it was for the plaintiff to provide the labour for the project. In any event, as I understood counsel for the plaintiff, he did abandon this claim.

Conclusion:

In all then, judgment is given for the plaintiff in the total sum of $10,910 plus costs which I fix at $500.

As no witnesses appeared for the defendant and therefore no evidence was adduced for the defendant, its counterclaim is struck out.

T F M Sapolu
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CHIEF JUSTICE