

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC. NO 53/08
PLAINT NO. 58/2008

BETWEEN **RAROTONGA REALTY LIMITED**
a duly incorporated company having
its registered office at Rarotonga
First Plaintiff

AND **JOHN MCELHINNEY** of Rarotonga,
Valuer
Second Plaintiff

AND **ISRAELA KORLENDER,**
of Rarotonga, Company Director
First Defendant

AND **COOK ISLAND LODGES LIMITED**
a duly incorporated company having
its registered office at Rarotonga
Second Defendant

Mr Arnold for First and Second Plaintiffs
Mrs Korlender in person
Date: 8 October 2008

ORAL DECISION OF WESTON J

1. In this claim the Plaintiffs sue to recover a commission payment they say is due to them arising from the sale of a lease owned by Cook Island Lodges Limited. The amount claimed is \$11,925.00. I see from paragraph 10 of the Statement of Claim that the basis of this claim is the recently completed sale of the Lodge which occurred in August of this year.
2. The First Plaintiff is an incorporated company. The fact of its incorporation was formally challenged in the pleadings but helpfully Mrs

Korlender withdrew that challenge this morning. I find the company was properly incorporated and that that occurred in 2006.

3. The Second Plaintiff is the individual who previously traded as Rarotonga Realty and who subsequently incorporated the First Plaintiff in 2006. Mr McElhinney is the major shareholder and a director of that company. He gave evidence that in many respects the manner in which he traded continued on interrupted notwithstanding the incorporation of the company. For example, his letterhead did not change. He says he received no legal advice as to his obligations under the Companies Act even though he did have a lawyer undertake the incorporation for him.
4. There are two defendants. The First Defendant is Mrs Korlender who is a principal of the Second defendant company. Mrs Korlender conducted this hearing and also gave evidence. Mrs Korlender accepts that the Second defendant company owes the Commission sum to one or both of the Plaintiffs. She does not put in issue the correct identify of the Plaintiffs. Rather, her concern in this litigation is to establish that she is not liable in her capacity as First Defendant.
5. The agency agreement was signed on 3 September 2003. Mr and Mrs Korlender signed it as did Ms Noovao on behalf of Mr McElhinney. Of these three persons I heard only direct evidence from Mrs Korlender.
6. Mrs Korlender gave evidence that most of the handwriting on this document is hers. The words "*Cook Island Lodges*" at the head of the document were written by Ms Noovao. The following lines were completed by Mrs Korlender. In particular, alongside the words "*Name of Vendor*", she wrote her personal name. As I understand it, this is the basis of the claim made against her personally.
7. Ms Noovao did not give evidence. She is employed by the Queen's Representative and I was advised that she could not be made available

during the time of the trial. Ultimately, though, I invited Mr Arnold to elect whether he wished to call her at some other time. He advised the Court that he did not and was content to leave his case without her evidence being heard and taken.

8. The issue for me to decide is whether, to the knowledge of either or both of the Plaintiffs, Mrs Korlender signed the agency agreement as a director of that company or whether she signed personally. For the following three reasons I find that she entered into the contract personally, even though it was in respect of an asset owned by the company.
9. First, I find that it was not known to Ms Noovao that the lease was in the name of Cook Island Lodges Limited. The only suggestion during the course of the evidence that she did have the lease came from Mrs Korlender but she was not particularly sure on that point. To be weighed against that is the overwhelming inference that the agency agreement refers to the details of the lease by reference to the names of one of two lawyers. It is inconceivable that that answer would have been provided if the lease was otherwise available for the signatory parties.
10. Secondly, I do not believe that Mrs Korlender made it clear that she was signing the agency agreement as a director if in fact that was the case. There is no reference in this document to the proper name of the company or to her capacity as a director. Mr and Mrs Korlender signed this agreement as if they were the owners. Before me, Mrs Korlender continually emphasized the two capacities that she held, that is, first, as a director and, secondly, in her personal capacity. While I find that she is quite clear about this distinction now, I also find that was not the case at the time she entered into the agency agreement. At that stage, the question of who would be liable for the commission was not a material point for her.

11. In answer to a question from me Mrs Korlender accepted that the only reason that she would say that Ms Noovao would have known of the company was through the land ownership details. But I have already found that the lease was not before the parties at the time of signing the agency agreement. Consequently, there was nothing to alert Ms Noovao to the existence of the company and the possibility that Mrs Korlender was signing in her capacity as a director.
12. Thirdly, in January 2007, Mrs Korlender was happy to pay the commission as the email exchange records and as she also said in evidence. At the time, assuming settlement of the then contract in or about January 2007, there would have been sufficient monies to make the payment. I find that at that time there was no particular concern as to whether the company or Mrs Korlender would pay. It was simply the case that there was enough money and that Mrs Korlender had every intention that the commission would be paid.
13. For those three reasons I find that Mrs Korlender did assume a personal obligation to pay the commission. I now need to address an oddity in this case. There was an invoice provided by Rarotonga Realty Limited in January 2007. That was in respect of a sale that did not proceed. Subsequently, that same purchaser entered into a contract in March 2008 for an amount exactly the same as in the earlier contract except that \$80,000 would be left owing as a vendor mortgage. It was this subsequent contract that was settled in August of this year. This contract shows the same overall amount for the purchase price and the same purchaser.
14. Mr McElhinney or the company did not raise a new invoice at that time. While I find that somewhat unorthodox, I do not believe it is fatal to the case. The invoice is not the basis of the claim, rather the contract is.
15. Consequently I find that Mrs Korlender has an obligation to pay the commission sum of \$11,925.00. I then address to whom that should

be paid. While it is arguable that it is payable to Mr McElhinney personally, I think that is a unrealistic prospect. The better view is that it is owed to his company on the basis that the business including this contract was assigned to it. If necessary I'd find there was a novation in all the circumstances. The invoice was raised by Rarotonga Realty Limited in January 2007. No point was taken either at that time or subsequently by Mrs Korlender that that was not the relevant party and I believe that reflects the reality of the situation.

16. So my conclusion is that Mrs Korlender owes the sum of \$11,925.00 to the Second Plaintiff. I understand that the Court is presently holding the sum of \$13,000.00 pursuant to a Mareva Injunction ordered on 24 July 2008. I direct that the sum of \$11,925.00 be paid by the Court to Mr Arnold's firm.
17. I now address the question of interest and costs. Both of these are discretionary although both would normally follow the event. In the rather unusual circumstances of this case I do not believe this is a case where interest should be ordered: if for no other reason than the relevant sale was only completed in August 2008. My provisional view is that costs also should not be paid but I will now invite the parties to address me on that.
18. The parties have now addressed me on the question of costs. Despite my negative indication Mr Arnold tells me that his instructions are to seek costs. I have given Mrs Korlender the opportunity to respond and she has left the matter to my discretion. I agree with Mr Arnold that costs should normally follow the event and indeed that is the view I indicated earlier.
19. Taking into account all the circumstances I will order the sum of \$400.00 payable in addition to the Judgment sum of \$11,925.00. So I direct the Court in addition to the sum mentioned earlier to pay the

further sum of \$400.00 to Mr Arnold's office and the balance of the monies held by the Court are to be paid by it as Mrs Korlender directs.

Weston J