TOBATAIBURI LTD, HUNUEHU AND HUNUEHU -v- ULUFA'ALU

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 21 of 1991
Hearing: 9, 10, 11 and 12 September 1991
Judgment: 16 September 1991

T. Kama for the Plaintiffs
R. Teutao for the defendant

WARD CJ: The first plaintiff is a company limited by shares and, on 22nd January 1991, at a meeting in the National Bank of Solomon Islands, the second and third plaintiffs purchased the total 500 issued shares from the five shareholders who previously held them. The transferees took over the assets and liabilities of the company. The former consisted of a two storey building in Tuvaruhu and the latter was an indebtedness to the NBSI of $250,000.

Prior to the share transfer, the defendant moved into the property at Tuvaruhu and still occupies the premises despite requests by the plaintiffs to leave.

Few of the facts of the case are in dispute. The case turns on the effect of an attempt by the defendant to purchase the shares.

The defendant explained to the Court that the plaintiff company was set up to take over the premises at Tuvaruhu which belonged previously to the defendant. The directors and shareholders of the company were largely relatives of the defendant and, he tells the Court, it was agreed that eventually the company would either allow the defendant to purchase the property back or the company would pay him the balance of the value of the premises amounting apparently to $136,000.

However, in 1990, the company could not pay its debts and was being pursued by its major creditor the NBSI. One of the directors, John Waleiurifo, entered into negotiations with the Bank and it was suggested he and his fellow shareholders should sell out to someone who could take over the debts. At one stage the defendant was named and the Bank was willing to agree to that subject to the clearance of a personal loan of $10,000 he already owed the Bank. At the same time, the second and third plaintiffs were approached and the Bank was also agreeable to them purchasing the company. The agreement of the Bank was essential because they would give a fully drawn loan to re-finance the $250,000 debt against the security of the Tuvaruhu premises.

The defendant and his wife told the Court that they arranged to pay off the personal loan and then set about purchasing the shares. They first contacted the two shareholders who were not related to them, Eddie Koti and Bartholomew Raiti. Bartholomew Raiti was seen on 15th December and agreed to transfer his shares for $100. At that time he was paid $20 and signed a blank share transfer form. In January 1991, on either 2nd or 4th, Koti agreed to sell, was paid $100 and signed another blank share transfer form. Those two forms were never completed and no registration occurred.

It appears that there were family differences between the defendant and his relatives in the plaintiff company. If that is so, it may account for the fact that Waleiurifo seemed to be doing all he could to assist the second and third plaintiffs to purchase the shares. In anticipation of their successful purchase, he and the other three directors resigned on 10th December 1990 and were replaced by the two plaintiffs. Koti also resigned as secretary and was replaced by the third plaintiff. Then on 22nd January the meeting occurred at the Bank at which all shareholders were present and each signed a share transfer assigning 300 shares to the second plaintiff and 200 to the third plaintiff and the transfers were registered.

The plaintiffs have since been unable to obtain possession of the premises at Tuvaruhu and have thus been unable to make the company earn any money. In order to satisfy the agreement with the Bank, they have already paid a substantial sum back using the assets of another company. They now seek possession of the building, rent for the period it has been occupied by the defendant and damages for the loss sustained by their inability to utilise the premises.

The defendant denies they have purchased the share of Koti and Raiti or that they have any right to evict him from the Tuvaruhu premises. He claims he and his wife are joint shareholders in the first plaintiff with the second and third plaintiffs or, alternatively, that the second and third plaintiffs hold the shares of Koti and Raiti in trust for them. Finally they claim that, by virtue of their shareholding, they have a right to use the premises in Tuvaruhu. The suggestion that a shareholding in a company gives a right to unrestricted use of the company premises has, not surprisingly, been abandoned by Mr Teutao for the defendant. The only issue is the right to the shares of Koti and Raiti and damages.

Much of the evidence of the defendant related to the setting up of the plaintiff company and the agreements with his relatives. Those matters do not affect the issues before the Court in these proceedings and I do not need to deal with them or to consider whether they give rise to any other cause of action. Clearly the defendant feels he has

been betrayed by the actions of others and considers he has a moral and possibly a legal right to the premises. However, in this action, the pleadings limited his claim for possession to the suggested right accruing from his shareholding and that has not been pursued.

The power to transfer shares is given by the Companies Act but the mode of transfer and any restriction on transfer are covered by the articles. The defence concede that the transfer of shares to the second and third plaintiff was in accordance with the articles of the company. They urge that the transfer was invalidated by the previous sale of shares by Koti and Raiti to the defendant.

I do not, on the evidence, accept there was a sale of those shares to the defendant. Whilst I accept the defendant paid a sum of money to the shareholders, I am not satisfied that the shareholders intended to enter into a sale. Thus the defendant did not acquire an equitable title and the transferors were not holding them in trust for the defendant. Neither can that payment have placed the second and third plaintiffs as subsequent purchasers in the position of trustees. Even if the defendant had established an equitable right to the shares, which I do not find he did, he failed to take the step to register the transfer and so acquire the legal right to the shares. The second and third plaintiffs did.

Mr Teutao, therefore, asks the Court to consider the broader equity of the matter. He points out that, although the transfer to the plaintiffs purported to be for $100 for each 100 shares, no money was in fact paid. Also he says the plaintiffs knew that Koti and Raiti had agreed to sell to the defendant. Thus he suggests that they do not come to the Court with clean hands. I do not accept that. This was a proper transfer of all the shares to the second and third plaintiffs. The consideration was the taking over of all the liabilities of the company and the transfer was in accordance with the articles.

I give judgment for the plaintiffs on their claim and on the counterclaim.

The plaintiffs have the right to vacant possession of the premises and I must consider damages.

The evidence on this aspect has been far from satisfactory. The plaintiff claims a substantial sum in lost profits from trading and rent of the premises. He is, of course, in a difficult position. He cannot give any information as to the stock in the store or the condition of the premises as he has not been allowed to enter. He has not traded in the area and can only use his experience as a businessman to try and assess the trading potential of the area and estimate his outgoings. He says another company he owns,

Eddies Transport, is willing and able to rent the upper floor and the yard for $4000 per month and, indeed, have incurred expenditure waiting for the premises. All his business predictions are disputed by the defendant who also has experience in that field. No documentary evidence has been produced and no evidence apart from their opinions have been placed before the Court. I do not feel I can award damages on that basis.

However, it is clear the plaintiffs have suffered one undisputed loss. In anticipation of the company trading when they took it over, they entered into an agreement to repay the Bank at a rate of $6000 per month. They have paid up to date. Had they traded during that time, they could reasonably have expected to pay much, if not all, of that from the profits of the company from the store and rental income. Equally, the defendant is liable to rent for the period he has occupied the premises. On the scant evidence I have heard, it is not possible to establish whether or not the second plaintiff anticipated profits are realistic and accurate. However I am satisfied that the profits would have at least met those payments and I order that the defendant pay the sums paid to the Bank by the plaintiffs by way of repayment up to the date of vacating the premises. That vacation must occur within 21 days of this judgment. Had the defendant been paying rent that would have been deducted from that figure but he has not.

It is unclear whether the first plaintiff claims rent for the period of occupation by the defendant from October 1990 to the takeover of the company by the second and third plaintiffs and so I do not find that liability proved.

Thus I order vacation of the premises by the defendant and vacant possession to the plaintiffs within 21 days. The defendant must pay the sum of money payable and actually paid by the plaintiff to the NBSI in repayment of the loan up to the date of this judgment and he is to pay damages at the rate of $6000 per month for any time they remain in occupation of the premises after the date of this judgment.

Mr Kama seeks costs to be ordered on a solicitor/own client basis because of the nature of the defence and the manner in which the defendant has prolonged the matter. I do not feel that is a sufficient reason to grant costs on that scale and I simply order costs to the plaintiff to be taxed on a party and party basis.

(F.G.R. Ward)
CHIEF JUSTICE