Molonai Finau v Intracor Trading Co. Limited

Court of Appeal
Roper, Morling and Cooke, JJ
Appeal No. 3/1990

10, 12 September 1990

Contract – promissory note – Contract Act not applicable
Bills of exchange and promissory notes – Contract Act not applicable
Procedure – appeal – grounds of appeal must be specified in notice of appeal
Appeal – practice – grounds of appeal must be specified in notice of appeal

The appellant appealed from a judgment of the Supreme Court awarding the respondent the equivalent of US$66,208.96 plus interest due under a promissory note given by the appellant to the order of Inter-Continental Trading Corporation, which was assigned to the respondent. At the appeal hearing, counsel for the appellant argued that the promissory note and its assignment was unenforceable by reason of the provisions of the Contract Act (Cap 26), which was the ground of appeal specified in the notice of appeal; and also argued some other grounds of appeal which were not contained in the notice of appeal.

HELD :

1. In future Order 5 rule 2(4) of the Court of Appeal Rules 1990 stating that an appellant cannot, without leave of the Court, rely on any ground of appeal not contained in the notice of appeal, will be strictly enforced;
2. The Contract Act (Cap. 26) does not apply to promissory notes or bills of exchange because it is excluded by section 100 of the Bills of Exchange Act (Cap. 108).

N.B. The Contract Act has been repealed with effect from 15 February 1991, but continues to apply to contracts made before that date.

Statutes considered
Bills of Exchange Act (Cap. 108) sections 86, 100
Contract Act (Cap. 26) sections 3-7
Court of Appeal Rules 1990, Order 5 rule 2(4)

Counsel for the appellant : Mr W. C. Edwards and Mrs F. Vaihu
Counsel for the respondent : Mr F. Hogan

Judgment

This is an appeal against the judgment of Martin C. J. in which he awarded the Respondent the equivalent of US$66,208.96 plus interest said to be the amount due under a promissory note.

The learned trial Judge's basic findings of fact are not challenged and can be shortly stated. The parties have traded together for some years and by 1986 the Appellant owed a considerable sum of money to the Respondent and an associated company for goods supplied. In July 1986 it was agreed that all sums owing would be brought together and secured by a promissory note. The total was US$99,618 and was to be paid by instalments. The Appellant failed to keep up the instalments and the present proceedings were issued.

The Appellant raised a number of defences, namely, that the money was owed to another company; that the note was not intended to be enforceable; that it was subject to conditions that were not met; that there was illegal consideration and that in any event he only owed half the sum claimed.

Martin C. J. rejected them all and there is no challenge to his findings in that regard.

The final defence raised at the hearing was that the note was unenforceable because of the provisions of s. 3(2) of the Contract Act (Cap. 113), a provision described by Martin C. J. as "introduced to protect Tongans from being cheated by foreigners and now used as a matter of routine by Tongan traders to cheat or attempt to cheat foreigners."

Martin C. J. rejected that argument and, according to the Notice of Appeal filed, the Contract Act defence was the only matter in issue, although expressed in a variety of ways.

However, at the hearing of the appeal, counsel raised issues which had never been raised at the hearing, so we have not had the benefit of the trial judge's opinion on them, nor referred to in the Notice of Appeal, and, we might add without leave being sought to raise them. We understand that this is a practice which has been tolerated in the past but it will not be acceptable in the future.

Order 5, Rule 2(4) of the Court of Appeal Rules 1990 reads"

"(4) Except with the leave of the Court (which may be given by a single judge) an appellant shall not be entitled on the hearing of an appeal to rely on any grounds of appeal, or to apply for any relief, not specified in the notice of appeal."

The Rule is clear and in future will be enforced, but having made the point we proposed to consider the additional matters raised by counsel and the first was that the note had not been stamped in accordance with the Stamp Duties Act and was therefore inadmissible as evidence. Some time was spent on this submission until our own inquiries established that the note had indeed been stamped.

The next submission concerned the payment of interest. The promissory note provides for interest at the rate of 15 per cent on unpaid principal, whereas s.12 of the Contract Act provides that "No interest at a rate higher than 10 per cent per annum shall be charged in or recoverable under a registered agreement." We will consider later in this judgment whether the note was in fact an agreement

requiring registration, but for the purposes of this submission we assume that it was. Mr Edwards submission was that as the interest "charged" in the note exceeded 10 per cent no interest was recoverable. Martin C.J. had regard to s. 12 and allowed interest only at the rate specified. The just and common sense interpretation of s. 12 is that if the interest charged exceeds 10 per cent, only interest at that rate shall be "recoverable". We therefore reject that submission. For reasons stated later it is probable that interest at 15 per cent was recoverable but as there was no cross appeal we do not propose to vary the order.

Mr Edwards next contended that the assignment of the note to the Respondent was imprecise and ineffective and consequently gave the Respondent no right to sue on it for default. It was further claimed that the assignment was invalid in that it had not been registered under the Contracts Act. It is appropriate to consider at the same time the contention that the note itself was invalid because of non-compliance with the Contracts Act.

A promissory note is defined in s. 86(1) of the Bills of Exchange Act (23 of 1973) as follows:-

> "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer."

The note in question comes within that definition but it is to be noted that the promise is to pay to the *order* of Intercontinental Trading Corporation, not to the Corporation itself. The note also contains the provision that payment is to be made to Intracor Trading Co. (NZ) Ltd., the Respondent, so it is a case of payment "to order". The note provides for sums certain to be paid on certain dates over a period, with a proviso that should there be default in payment of an instalment the total becomes due. In *Kirkwood* v *Carroll* [1903] 1 K.B. 531 it was held that a note containing such provisions was a valid note.

As for Mr Edwards' submission concerning defects in the "assignment" of the note, on the 31st May 1989 Inter-continental wrote a letter addressed "To Whom It May Concern" stating that it had assigned its "receivable" from mr M. Finau of US$66,208.96 to Intracor Trading co. (NZ) Ltd. And on the 16th October 1989 wrote to the Appellant informing him of the assignment. The letter of the 31st May may have lacked precision, as Mr Edwards claimed, but in our opinion it was an unnecessary document, for by the note itself Intercontinental had already directed payment "to its order".

As for the alleged failure to register the promissory note and its assignment as required by the Contract Act, the simple answer is that pursuant to s. 100 of the Bills of Exchange Act section 3 to 7 of the Contract Act "have no application to bills of exchange and promissory notes."

It was alleged that the note was a fraudulent device to circumvent the provisions of the Contract Act but we reject that. It was simply a commercial document resulting from negotiations between business men.

We therefore reject the appeal and order the Appellant to pay costs, to be taxed if not agreed.