Sun Islands Inc. v Fewtrell

Supreme Court, Nuku'alofa
Webster J.
Civil Case No.48/1989

28, 29, 30 August 1990, 13 & 15 March 1991

Contract - extrinsic evidence - when receivable
Costs - discretion - no award
Employment - never commenced - no damages as no breach
Evidence - extrinsic evidence of contract - exceptions to parol evidence rule

The Plaintiff sued the Defendant who was to assist in setting up a tourism venture for the Plaintiff and eventually becomes its manager for return of goods for an accounting for and payment of money received for hire of the goods and for damages for loss of use of goods. The Defendant counterclaimed for non-payment of of a fee of $5000 owed him he claimed, by the Plaintiff for helping set up the venture or in the alternative in effect an amount as a quantum meruit for work done for the Plaintiff, and for loss of salary.

Held:-

1. The Plaintiff was entitled to the goods and the Defendant had no lien over them.
2. The Plaintiff, on an accounting, was owed moneys by the Defendant from the hire and sale of goods.
3. That extrinsic evidence could be received in the circumstances to ascertain the entire terms of the agreement (of future employment) between the parties, the written agreement produced not containing the entire agreement.
4. There was no breach of the agreement and as employment did not commence, no damages and/or salary in lieu of notice, could be awarded the Defendant.
5. The Defendant was entitled to a reasonable amount for the setting up worte he had done but not the full fee.
6. In the circumstances there should be no costs either way.

Counsel for Plaintiff : Mr N. Tupou
Counsel for Defendant : Mr. 'Etika

Judgment

Preliminary

In this case the Plaintiff, Sun Islands Inc. USA, a company established in the US and starting a tourism business in Tonga, ues the Defendant, Ian Fewtrell, a businessman formerly in Tonga, for the return of 4 hire scooters and 10 helmets and the refund of $7560 received by him for the Plaintiff. The Plaintiff also claims $2500 general damages for loss of use while the scooter were held by the Defendant after the Plaintiff had instructed their delivery to Mr Albin Johansson for safe-keeping.

The Defendant denies the claim, saying that the Plaintiff's President and representative Mr Gary Stone authorised all expenses and was given a statement of these. He counterclaims for breach of his agreement in 1988 with the Plaintiff to assist it in setting up a Tongan company (Sun Island (Tonga) Ltd); obtaining a development licence; and securing a lease of an island. He claims he was never paid his fee of $5000 for that. The Defendant also claims that the Plaintiff employed him as manager of the Tongan company at an annual salary of $50,000 and he claims arrears of salary of $18,221. He further claims reimbursement of expenses of $2711 incurred for the Plaintiff, plus general damages of $9282 for loss of employment measured at 3 months salary, less money owed to the Plaintiff for sale of a jeep. The Defendant's total counterclaim is therefore for $35,214.

The Plaintiff denies all items of the counterclaim, saying that matters were never completed by the Defendant to allow the Tongan company to start operations.

(The evidence was the set out detail and findings of fact made on the various heads of claim and counterclaim. The judgment then continued to p.7 para 29 include paras. 29 & 30; then 43).

Applying the law to the facts -

Arrears of salary as General Manager

The agreement for the appointment, the fax letter of 7th August, 1988 (Exh.13) is a written agreement. While extrinsic evidence is not in general admissible to contradict a clear written contract (Chitty on Contracts (26th Ed) para 846) Mr Tupou submitted for the Plaintiff that it should be admitted in this case. Mr 'Etika contested this.

Here there are several reasons why extrinsic evidence can be considered under the exceptions to the parol evidence rule. Both parties said in evidence that Exh.13 did not contain the entire agreement (Finding 45). It was not intended to express the entire agreement (Chitty para 847) and was perhaps just an informal memo of their pervious agreement (para 857): it begins "... a note to clarify our agreement ...". The words may have more than one meaning (para 869) or a special meaning (para 817).

The intention of the parties is, as a general rule, to be construed objectively. The language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by the other, or at least in the sense in which a reasonable person would construe it (Chitty para 351).

There are three salient points of the wording -

(1) The agreement is between the US parent company, Sun Islands Inc, and Ian and Robin Fewtrell;

(2) Ian and Robin Fewtrell are to be employed as General Manager by Sun Islands Inc.;

(3) This is to occur "upon final paperworks needed with the lease on the island of

Makaha'a". The word "needed" is particularly significant.

I have found the Mr Fewtrell knew about Mr Stone's intention to get a sub-lease to the US company from an early stage (Findings 35 and 39). He must therefore reasonably have understood this agreement with the US company and the words in it "upon final paperworks needed with the lease . . . . ." the mean on completion of the sub-lease to the US company, which in the circumstances was required by the US company to obtain finance (Finding 52). This is emphasised by the agreement being with the US company, not the Tongan company, even although the latter had been registered by then. The letter must be talking about the lease as it affected the US company, even if it uses the word "lease" loosely, rather than the more technically correct term sub-lease.

Mr Johansson, an independent party, confirmed that his understanding was that this meant the sub-lease also (Finding 51).

This interpretation of the agreement also makes practical sense. I accept that there would be no point in appointing a general manager who had nothing to do. I also accept Mr Tupou's submission that on the evidence the US company was the whole focus of what was being done.

Even if Mr Stone did congratulate Mr Fewtrell on the appointment (which I do not find to be the case), he did so as a result of false information given to him by Mr Fewtrell and is not bound by that. There was no evidence that the US company had started operating or constructing a large resort in Tonga or, apart from Mr Fewtrell's oral evidence which I do not accept, that Mr Fewtrell had done anything substantial as general manager apart from the separate scooter operation. There is no paperwork to support his claim that the appointment began in October.

The sub-lease has not yet been obtained (Finding 39) and so the employment has not started. Unless the agreement in cancelled earlier, the appointment as general manager will not take effect until the US company actually gets a sub-lease registered. Mr Tupou submitted that the agreement has been frustrated, but I do not think that is yet the case. It is too early to say that a sub-lease to the US company will never be obtained (see Chitty para 1635 and Finding 36).

So both a straightforward interpretation of the wording of the letter andt he extrinsic evidence go against the Defendant.

Payment in lieu of notice

Different considerations apply to the Defendant's counterclaim for 3 months salary in lieu of notice. It is essentially a claim for a different type of breach of contract. In certain circumstances it might be upheld even if the employment had never started, e.g. as a result of a breach of contract by the employer.

But that is not the case here. There has been no breach of the agreement by the employer, the Plaintiff, and none is alleged apart from termination and non-payment. The position is simply that the event which both parties agreed would start the employment has never occurred.

So as there has been no breach of the agreement there can be no damages due to the Defendant and has counterclaim for salary in lieu of notice must also fail.

Damages for loss of use of scooters

The Plaintiff claims damages for the loss of use of the scooters while they were held by the Defendant from the time the Plaintiff instructed him to deliver them to Mr Johansson by Exh.19 until the Court order of 9th June 1989.

But this was done at the initiation of the Plaintiff itself, as Exh.19 shows. If Mr Fewtrell had delivered the scooters thent hey would have been stored in a safe place until Mr Stone was able to arrive. So as the scooters were not physically damaged, the Plaintiff did not suffer any loss by them being held by Mr Fewtrell. Therefore there can be no entitlement of the Plaintiff to damages in these circumstances. Even although the Defendant was owing the Plaintiff money then, so also was the Plaintiff owing the Defendant a very similar sum, as I have found.

Conclusion

The Court therefore finds that the Defendant Mr Fewtrell owes money to the Plaintiff Sun Islands Inc., who also owe him money, as follows -

Due to Plaintiff for scooters (Finding 29)	-	$ 465.50
Due to Plaintiff for jeep (Finding 30)	-	2500.00
		$2965.50
Less : Due to Defendant for work done (Finding 43)	-	2500.00
BALANCE DUE TO PLAINTIFF BY DEFENDANT	-	$ 465.00

The Plaintiff did not claim interest so none can be awarded except from the date of judgment. I shall award it at 10% until payment.

There can therefore be no question of the Defendant having any continuing lien over the scooters, outboard engine, helmets, lease or other papers and the Court will order that these are all delivered to the Plaintiff.

The Court delivers judgment accordingly.

Costs

Each Counsel submitted that whichever party was successful in the whole action should get costs, even if the eventual outcome resulted in only a small balance being due. But the Court has a discretion on costs and unless the parties have actually agreed that costs should be awarded to the successful party regardless of other considerations the Court is not bound to follow what Counsel submit.

In this case there were points for and against on each side and the Court has found that each party owed the other sums of money which were not negligible. If the Plaintiff had paid the Defendant $2500 two years ago it might not have been necessary to raise an action for recovery of the scooters. Therefore it is fair to make no award of expenses to the successful Plaintiff.