

## **Pekipaki & others v (Administratrix of) O.K. Toutai Co. Ltd & others**

10 Court of Appeal

Ward CJ, Martin & Burchett JJ.

Appeal in Civil Case No.514/92

12 & 15 April 1994

*Administration of company - ownership of assets*

*Company - administration - assets - directors - accounts.*

20 *Estoppel - who can plead and claim such.*

*Directors - company - professional qualifications not required*

*Practice & procedure - judge - response to appeal.*

The administratrix had obtained Orders in the Supreme Court that four certain assets, claimed by the Appellants personally, were instead the property of the company, on the basis that those assets were included in the relevant accounts and balance sheets of the company, as approved by the appellants, and that therefore the appellants were estopped from denying the ownership of the assets by the company on appeal.

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Held:

1. The effect of the Orders was to get assets into administration on the basis of an alleged estoppel in favour of one or two only of the parties interested in the administration.
2. Thus creditors and contributories, in whose favour no estoppel had been shown, would obtain the benefit of the appellants' property.
3. That was wrong on the basis, first, that one of the Respondent banks was making no claim directly against the appellants, and the action had not been brought by the Bank so no question of estoppel in favour of the Bank could arise, and secondly, the claim against the appellants was made only by the administratrix for the benefit of creditors and contributories generally who could not claim an estoppel in the circumstances proved.
4. That being so the Court found, from the judge's findings of fact and credibility in the Supreme Court, that 3 of the four assets were those of the appellants and the fourth, of the company.
5. (Obiter) Despite what was said in the court below company directors do not require special or professional qualifications.

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6. (Obiter) A judge should not respond to a Notice of Appeal; and any such response should not be taken into account on appeal.

Cases referred to : Jones v Dunkel (1959) 101 CLR 298  
R v Australian Broadcasting Tribunal (1988) 144 CLR 13  
Fuko v Afeaki (Court of Appeal 8/4/94)

60 Counsel for Appellants : Mr Edwards  
Counsel for First Respondent : Mr Hogan  
Counsel for Second Respondent : Mr Macdonald  
Counsel for Third Respondent : Mr Waalkens

### Judgment

By an application in the Supreme Court of Tonga taken out by her predecessor as Administrator of O.K. Toutai Company Limited ("the Company"), the first respondent sought orders that she was entitled to certain property. Many items were ultimately not disputed, but at the hearing, questions as to six remained to be decided. Dalgety J. held that a store with a warehouse attached in Salote Rd Nuku'alofa, shown as the Company's property in its books, actually belonged to a Mrs Moimoi, but that a shed and freezer, also in Salote Rd, were the property of the Company. That left four items which are the subject of this appeal. All were found to be the Company's. They are :

- Item 3, or so far as it included a dwelling in Railway Road, Nuku'alofa, with storage space under it. (The original item in the list of property claimed as the company's included a warehouse and shed building abutting against part of the wall of the dwelling, but structurally separate from it, except that the concrete floor was continuous. That was admittedly the company's. The whole of item 3 was referred to by the judge as an "L-shaped rear unit", there being another house at the front of the town allotment, which was accepted as private.)
- Item 45, a Hyundai motor vehicle, C2009.
- Item 46, a Hyundai motor vehicle, C2064.
- Item 57, a term deposit with the Bank of Tonga in the sum 20,000 pa'anga, with accumulated interest.

The current value of the assets still in dispute, having regard to the figures in the judgment, may be something under 60,000 pa'anga.

The case for the Administratrix seems to have been presented on the basis that each of the items was either shown as an asset of the Company in relevant accounts and balance sheets of the company, or at least was included in the calculation of larger figures so appearing in those documents (eg. the whole of item 3 was included under the title of "buildings"). The inclusion in the calculations which has been referred to was demonstrated by reference to working papers under the hand of the Company's accountant. The argument then was that the accounts should be taken to have been approved by the appellants 'Ofa and Hale Pekipaki and by the now deceased Kelepi Toutai Pekipaki, 'Ofa's husband, all of whom were directors and shareholders. On the basis of these accounts, it was said, the respondent Bank of Tonga continued to provide an overdraft facility to the Company; and it followed that the appellants were estopped from denying the ownership of the assets by the Company in accordance with the state of affairs represented in the accounts.

The trial judge accepted this argument. It is important to note that the argument did not proceed on any assumption that the accounts were in fact correct, nor did his Honour find that they were. On the contrary, although Mrs Moimoi's property appeared in the accounts as the Company's, he rejected the claim in relation to it. The distinction he took was that she was neither a director nor a shareholder, "nor was she privy to the terms of their financial accounts or the company's dealing with for example their bankers. As against her therefore the documentary evidence is not conclusive" (emphasis added). Indeed his Honour expressly said, referring to the inclusion in the accounts as property of the Company of each of the items the subject of the appeal: "Perhaps this was the result of a mistake by Tupou" (the Company's outside accountant, who is now deceased). This

concession in the Appellants' favour was inevitable, since 'Ofa Pekipaki was not even cross-examined upon an affidavit which spelled out in some detail the basis of her assertion of title to the motor vehicle Item 46, for which she had paid and which was registered in her name, and the circumstances under which she personally had accumulated the moneys represented by the term deposit, Item 57. And her husband, Kelepi Pekipaki, who was cross-examined, was accepted as a witness of truth. The judge referred to his "candid honesty", and commented: "He was a gentleman who knew exactly what he was about and whose word I accept." It was this gentleman who confirmed his wife's evidence about the term deposit and the car, and said of the construction of the dwelling, which was their residence built on his registered town allotment, in answer to the question whether it was funded by the Company: "We had a personal loan. I'd like to say that my home is a town allotment. It is a[n] hereditary 'api that [has] heirs to the ownership of the 'api, but it's not for the Company and that is all I want to make sure."

It is convenient to note here that both 'Ofa Pekipaki and her husband Kelepi had private sources of income outside the Company. Kelepi, his Honour accepted, spent most of his time farming, while his son Hale was responsible for the business of the company. Kelepi Pekipaki gave evidence, which was not challenged, that he farmed over ten acres of squash pumpkins and also grew export crops for New Zealand. It was not suggested to him in cross-examination that his personal income had been insufficient to pay off the house nor that he had used company money to do so. Nor was any attempt made to refute Kelepi Pekipaki's evidence by the production of any bank records, or any Company records, demonstrating that the loan was in the name of the Company or that it was paid off by it. In that situation, Mr Pekipaki's evidence, and also the inferences arising from it, can be more readily accepted: Jones v Dunkel (1959) 101 CLR 298.

It should also be observed that the evidence of the responsibility of the first two appellants and of Kelepi Pekipaki for the representation, to the Bank of Tonga, of the contents of the accounts was less than compelling. Certainly, the son Hale was said to have had overall charge of the Company, and his Honour accepted this assertion. But 'Ofa Pekipaki's unchallenged evidence was that she left the books to her husband and son, and this also his Honour accepted. As for Kelepi Pekipaki, although he too did not concern himself with the accounts, and his Honour held that "he had little to do with the company", he did sign a letter forwarding them to the Bank of Tonga, a letter which he said had been prepared by the outside accountant. He said he did not read what he signed. There was no evidence of any resolution of the directors adopting the accounts. The judge referred in general terms to "various statutory irregularities as to approval and filing of the accounts" (emphasis added).

Far more important, however, for the fate of this appeal, is the fact that the judgment below rests squarely on the basis of an estoppel which could only work in favour of the Bank of Tonga, or perhaps that bank and the Tonga Development Bank. Yet the proceeding was not brought by the Bank of Tonga, nor did it involve any cross-claim by the Bank against any of the Appellants. It was an administration proceeding by which the Administratrix sought to get in the assets of the Company for the benefit of all creditors and contributories. His Honour's judgment is written on the assumption that there will be a surplus of assets after payment of the Bank's secured debt. It follows that the effect of his Honour's orders is to get assets into the administration on the basis of an alleged estoppel in favour of one or two only of the parties interested in the administration. Thus

creditors and contributories, in whose favour no estoppel has been shown, will obtain the benefit of the Appellants' property. On two clear grounds, this must be wrong. The Bank, which was joined only to enable it to assert against the Company its charge over any property recovered in the proceeding, i.e. upon its being once shown to be the property of the company, was making no claim directly against the appellants or Kelepi Pekipaki; therefore, no question of an estoppel in favour of the Bank could arise. And furthermore, the claim which was asserted against those persons, and asserted only by the administratrix, was in the administration and for the benefit of creditors and contributories generally, who could claim no estoppel in the circumstances proved.

If any further demonstration be required, from the language of the judgment, of the statement that it proceeds only upon the basis of the alleged estoppel, two key passages make that position perfectly clear. Before coming to the details of the items in dispute, the judge said:

"The company employed Tupou to manage the financial affairs of the company but the directors cannot escape responsibility for what he did in their name simply because they do not understand corporate accounting. If they failed to supervise Tupou or question him that is their problem and they must live with the consequences. And it is with the consequences that this trial was concerned."

At the conclusion of the judgment, it is said (of the residence):

"This property however was held out in the accounts as a corporate asset and the banks relied upon that representation of fact in advancing monies to the company. That it quite enough for present purposes. The widow may well wish to claim that she is entitled to reside there rent-free for the rest of her life ..."

Since it was not appropriate to dispose of the case, as his Honour did, on the basis of an estoppel arising out of the accounts prepared by the Company's accountants, it is necessary to consider whether it is possible for this Court to deal with the matter upon the judge's findings and the material in the appeal papers. As has been said, the judge accepted the late Kelepi Pekipaki as a witness of truth, and the evidence of his wife was not challenged by cross-examination. Their son Hale, on the other hand, was expressly disbelieved. It is in the light of the fundamental conclusions about the credit of these persons which the material suggests that a determination in respect of each of the disputed items should be made.

As to the term deposit, not only is the appellants' case firmly grounded in evidence from Kelepi and 'Ofa Pekipaki; it is also strongly supported by a document of the Bank. For it appears that in or about 1988 the Bank of Tonga took a security by way of charge over the term deposit. That charge was not taken from the Company, but from Kelepi and 'Ofa Pekipaki personally. It referred to "advances and accommodation already granted and hereafter to be continued" by the Bank to them, not to the Company, and it provided that they, not the Company, directed the Bank to hold the deposit "against the moneys ... secured" by the security. Having regard both to the evidence of 'Ofa and Kelepi Pekipaki and the Bank's own document, the clear conclusion is that the term deposit is not the property of the Company. Even if, contrary to what has already been held, it was open to the Administratrix to rely on the alleged estoppel, such an estoppel could not be effective in the face of the Bank's knowledge of the true position shown by the terms of

its security. The deposit is the property of 'Ofa Pekipaki, or possibly it belongs to her and to her late husband's estate.

Turning to the motor vehicles, C 2064 is the subject of clear evidence in 'Ofa Pekipaki's affidavit that it is her property. There should be a declaration to that effect. But the motor vehicle C 2009 is claimed by Sione Hale Toutai Pekipaki, whose evidence was not accepted. Since, on the judge's findings of fact, he was in actual charge of the Company and must have been aware of the accounts which showed the vehicle as the company's, and of the insurance of the vehicle by the company in its name, the disbelief of his evidence assumes some importance. On the evidence and findings as to the facts, the actual decision regarding this vehicle should be sustained, though not the reasoning on which it was based. The vehicle is the company's.

The last item is the residence which is occupied by 'Ofa Pekipaki, and was, during his lifetime, also occupied by her husband. Reference has already been made to the evidence about this. It depends on the credit to be given to the word of Kelepi Pekipaki. He was accepted by this Honour in quite glowing terms as a candid and honest man. In the light of that; in the light of the inherent probabilities of the situation involving the building of a private residence on a town allotment by a man with a source of income independent of the Company; and in the light of the failure of the respondents to adduce evidence which is likely have been available to refute Kelepi Pekipaki's statements had they been false, the residence and the ground floor area immediately under it should be held not to be the property of the Company.

Before parting with this aspect of the case, the Court should say something with reference to some comments in the judgment below about the qualifications of directors. It is not correct to suggest that directors require special qualifications such as are possessed by lawyers and accountants. They are expected, where it is required, to be guided by the advice of professional persons. In this particular case, serious lapses occurred. It is to be hoped the lesson has been learned.

There was a cross-appeal by the Administratrix on the question of costs. So far as the Appellants are concerned, their substantial success makes it unnecessary to discuss whether the order allowing their costs should have been sustained upon the basis on which it was made. But the costs of the two Banks are in a different position. No doubt they wished to leave no stone unturned in protecting their securities. But it is not reasonable to load the very substantial costs of their involvement in the hearing upon the other parties. There was never any dispute that they were secured creditors in respect of any of the property in question as to which the Administratrix might establish that the Company had a right to it. The orders in respect of the costs of the Banks made below should be varied to allow only the reasonable costs of consideration of the Application and of a non-contentious appearance on the first day of the hearing.

Finally, there is a document in the appeal papers which describes itself as a "Note" made by Dalgety J. It is dated nearly a month after the date of the judgment, and appears to be a response to a ground of appeal which had then been raised. We have not taken this document into account, because we do not think it would be proper to do so. It is for the parties to put matters before the Court of Appeal, not for judges to respond to a Notice of Appeal. The Court must not descend into the arena to side with one party. Even an Administrative Tribunal; because it is bound to act judicially, should not do so: The Queen v The Australian Broadcasting Tribunal, Ex parte Hardiman (1980) 144 CLR 13

at 35 - 36. See also the very recent decision of this Court in Fuko v Afeaki (Morling, Martin and Burchett JJ., 8 April 1994).

The orders of the Court are:

1. Appeal allowed in respect of (a) the residence and its ground floor the subject of appeal; (b) the term deposit the subject of appeal; (c) motor vehicle C 2064. The orders made below in respect of those items are set aside, and in lieu thereof it is declared that each of these items of property is not the property of O.K. Toutai Company Limited.
- 270 2. Appeal dismissed in respect of motor vehicle C 2009.
3. Cross-Appeal allowed in respect of the costs orders in favour of the Banks which are set aside, and in lieu thereof the orders are made which are indicated above.
4. Cross-appeal dismissed in respect of the costs order in favour of the Appellants.
- 280 5. It is ordered that the costs of the appellants of the appeal and of the Cross-Appeal, assessed at 750 pa'anga, be paid by the administratrix out of the assets under her administration together with her own costs assessed at the same amount and the costs of the Banks assessed at 300 pa'anga each.