

## Seluini v Faletau & Trident Heavy Engineering

Supreme Court, Nuku'alofa  
Hampton CJ  
C.1020/95

19 & 20 February 1996

*Contract - uncertainty - enforceable or not*  
*Defamation - statements - in Court - privilege*  
*Injunction - misleading court - discharge*

The plaintiff sued the defendant alleging a breach of contract over a shipment of paint. The defendants counter claimed for defamation.

Held:

1. On the plaintiff's own evidence there was a considerable degree of uncertainty lack of clarity, lack of precise definition as to what it was that the plaintiff alleged was contained within, and the subject of, the contract.
2. There was not sufficient certainty in any of the discussions of the parties to enable the court to spell out what the contract was. And even if a contract was found, it would be so uncertain as to be unenforceable. On the evidence the court could not find a contract had been formed.
3. The plaintiff had misled the court quite markedly when he sought and obtained interim injunction, and later had its terms varied.
4. The claim should be dismissed, and the injunction discharged.
5. The counterclaim was in defamation, but it could not succeed because the alleged defamation was founded on what had been said in the court, and that must be privileged. There was no evidence called as to loss or damage. The counterclaim was dismissed.

Counsel for plaintiff : Mr W. Edwards  
Counsel for defendants : Mr Talanoa

### Judgment

I have listened carefully to all the evidence which has been given, and I have regard to all that evidence and to all the exhibits which have been produced, and there are a considerable number of them.

I took the option the other night to refresh my memory as to the exhibits and go through them all, and to look through the notes that I had taken of the first day's hearing. I have listened with care to the submissions just made and if I do not deal with all the submissions that have been made to me in the course of this judgment, that is not a reflection on the submission. It is a reflection on the fact that I am giving an oral judgment now because of the importance of the matter to all the parties and the significance of a container of paints sitting on the wharf at Queen Salote, something waiting to be done to it.

I also add as a general comment that I can only judge the matter on the evidence which is placed before me, making that comment, in the light of two aspects. The first: it seems to me that some of the documents which have been presented are not necessarily all that relevant but a lot of others that have been mentioned may well have been more relevant but have not been produced. I will deal with some of those as I go along and that touches on both sides I believe. The second aspect being that I have not heard any evidence from Taubmans in Fiji, whether from Mr. Martin or otherwise, which may have cast some light into some of the murky waters.

I say at the start, that this is not an action for wrongful dismissal, that is the dismissal of the plaintiff, from the employment of the second defendant. The second defendant alleges or claims that the plaintiff was employed by the Company as Manager of the Paint Division. And the second defendant says that he, the plaintiff, was dismissed from that employment at the end of November 1995.

The claim is an action for breach of contract in effect. The plaintiff says that there was a verbal contract or arrangement between him and the defendants; (the first defendant named being the Managing Director of the second defendant) as to the importing, mixing, and intended distribution and sale of a container of paints purchased from Taubmans in Fiji. It is just one container of paint, that came on the Forum Samoa - some \$32,36.03 of paint - which is the subject of these proceedings. And it is the shipment that arrived on the Forum Samoa from Fiji, Voyage No.257, as is referred to in the various documentary exhibits, particularly the Bills of Lading and the Invoices that have been produced.

The plaintiff alleges a contract. The defendants deny such. The plaintiff in general terms says that there was a contract between him and the second defendant and that in effect the importing of this container of paint was to be a joint venture between him and the second defendant. The defendants on the other hand say that that is not the case, there was no such contract. The only contract was that the defendants were going to import this themselves (this container of paint) from Taubmans and set up a Paint Division and employ the plaintiff as the Manager of that Paint Division.

On the balance of probabilities the plaintiff has to establish there was a contract such as he alleges. I turn to his brief of evidence itself, and that was put in, in written form. I look at that brief of evidence and when I look at it I find that, as I will come to it, there is contained within that brief of evidence itself a considerable degree of uncertainty, lack of clarity, lack of precise definition as to what it was that the plaintiff alleges was contained within, and the subject of, this contract.

So if I were to find that even if there were some sort of discussions of a joint venture nature between plaintiff and defendants, I could not see sufficient certainty in any of those terms to enable me to spell out exactly what their contract was. And it seems to me that even if I were to find (which as I will go on to find, I do not on the evidence) but even if I were to find there was a contract, it would be so uncertain as to be unenforceable.

As I have said, first, there was a lack of clarity in the terms and the conditions which are claimed to exist in this contract or arrangement. Secondly, given the onus on the plaintiff on the balance of probabilities, I cannot find on the evidence that there was indeed  
100 a contract formed.

The defendant, as I have said, alleges that there was an employment, by the second defendant of the plaintiff, as its Paint Division Manager; and a later dismissal of him, on the 29th of November, for some sort of impropriety, and the suggestion even that that may have been a matter of theft given what is on the face of the documents and what is to be seen on the invoice D.19 at page 4 and in the letter from Taubmans of Fiji to the second defendant of 14 February 1996, Exhibit D.22.

The documents which have been produced, or all the ones that are particularly relevant, seem to me to indicate that this container of paints was shipped to and for the  
110 second defendant. There is support to be found, as I say, in those documents particularly in the invoices and in the bill of lading. Both of those documents I accept have the plaintiff's name on them, but only as a point of reference as the ordering person, that and no more. They quite clearly state that the consignment of paints is for Trident Heavy Engineering. So you have documents such as those invoices, the bill of lading, the customs entry forms, the sale tax forms, the tenancy agreement, the receipts for rental and bond, all of which indicate that this container of paints was being imported into Tonga from Fiji by the second defendant and that the second defendant was setting up a shop in Railway Road from which to sell those paints.

It is perhaps true that the defendants have not helped themselves, to some extent, by  
120 not producing some of the other documents that must obviously be within their possession or at least, on the evidence of Mr. Faletau Jr., must have been in their possession such as (a) the reference he made in his evidence to letters from customers or potential customers when the market survey was done; (b) the pay records referred to by him and again by a subsequent witness Mr. Kumar. One would have thought they should have been produced; (c) the minutes of the company meetings that were referred to by Mr. Faletau Jr.; and so on.

Nevertheless on the documents which I do have, I make the finding that I have indicated namely that on the evidence the balance of probabilities comes down in favour  
130 of the plaintiff being employed as the Manager of the Paint Division by the second defendant.

The plaintiff, as I have already indicated, cannot show on the evidence that there was a contract. I find on the other hand, on the balance of probabilities, that he was employed as the Manager of the Paint Division. All these actions which I have heard about, it seems to me quite appropriately, fit within the duties of the Manager of that Paint Division. There is some support in the oral evidence for that position as well as the documentary materials which I have briefly referred to. The plaintiff's third witness, Tevita Taufu, in cross-examination, was asked if he knew whether Koloti worked for the second defendant  
140 and he said yes, he did know that.

Several of the defendants' witnesses, over and about the Faletau's themselves, i.e. Junior and Senior, gave evidence which was supportive of that position as well. The Assistant Manager of Tonga Timber referred to the fact that he was told by the plaintiff himself that he, the plaintiff, was the Salesman for the Company, that is the second defendant company and of course it was that witness who produced the letter Exhibit D.23 which I have already referred to, and which makes it clear that that approach in late October 1995, to see whether the Tonga Timber Company was interested in buying paint, was an approach made on behalf of T.H.E. Paint Division. Another defence witness, Mr. Kumar, who is an acknowledged part of the second defendant's organisation, said this is an affidavit which he confirmed on oath before me.

"Whilst in Fiji, I met in about July 1995 with one Mr. Vincent who happens to be a Salesman of Taubmans Paint Fiji Limited, who asked me, Mr. Kumar to meet a Company in Tonga, re Taubmans Paint Fiji Limited to market their products. I was the initial contact. This meeting with Mr. Vincent eventuated into my meeting Ian Martin, the General Manager of Taubmans Paint Fiji Limited. The rest of the negotiation was handled by Trident Heavy Engineering Paints Division. I know one Koloti whose post in the Company Trident Heavy Engineering was Manager Paint Division under Trident Heavy Engineering Co. Limited at Nuku'alofa."

I find confirmation also from the evidence of Mr. 'Aho from Teta, the landlord, who gave evidence that the first approach about taking the shop premises in Railway Road came from the plaintiff. But Mr. 'Aho said that the plaintiff told him that he was working for the second defendant. And I have already commented on the fact that it was Mr. 'Aho who gave evidence as to the payments of rental bond and the signing of the rental agreement.

Through that evidence, and other evidence I have heard, I have come to the firm view that I have indicated, namely that on the balance of probabilities, the plaintiff was an employee of the second defendant and it was in that capacity that he acted in relation to the shop and in relation to the negotiations to import this one container of paint which is at issue.

If I turn then to the statement of claim, paragraph 1 alleges the verbal agreement and the claimed conditions. I have already commented sufficiently I believe on the alleged agreement and the conditions of it, except to add a comment on (1) (e) which is an allegation "that the plaintiff and the first defendant would set up a shop at Taufa'ahau Road and that the plaintiff would run the shop." That of all the allegations was central to the claim that was made on 8 December 1995, on the issue of the statement of claim on the same day, for an interim injunction. It is significant that the interim injunction was sought on the basis that there should be restraint placed on the defendants in relation to the business and shop premises in Taufa'ahau Road Nuku'alofa known as Danny's Paint Company. As it transpired, on the evidence I have heard, there was never any such shop in Taufa'ahau Road. There was a shop in Railway Road. On December the 12th the plaintiff came back to this Court and sought a variation of the interim injunction which had been made, by changing the address of the shop, Danny's Paint Co. to substitute Railway Road. That was done. As it turns out, there never was, and nobody else who gave evidence has ever heard of, a Danny's Paint Co.

Perhaps (1)(g) should be commented on. It was the subject of a late amendment on the opening day of this hearing. (1)(g), as originally cast, said this: "that all monies

received from sales would be banked under the account of Danny's Paint Co.\* That was amended to read "under a separate account". Yet it is significant that this unamended statement of claim was sworn to by the plaintiff and was used as the basis of an urgent interim injunction application and on which the interim injunction was made.

It seems to me that the Court was misled quite markedly as to those matters.

Paragraph 2 of the statement of claim I have already sufficiently commented on about the lease of premises; as with paragraph 4 about rent.

200 Paragraph 6 is an allegation that the plaintiff obtained an "agency from Taubmans Paint Fiji Limited in the name of the second defendant." That I have already commented on. It seems to me that the correspondence I have referred to in particular D.1, D.18 and D.20, makes it clear that the agency was with the second defendant.

Paragraph 8, for example, I comment on. There it is claimed that it was a "condition of payment of the shipment of container that a site draft would be presented before the release of the paints from the wharf." There was no evidence before me as to that whatsoever.

210 Paragraph 10: "parts of the goods were released to the shop, Danny's Paint Co. which was operated by the defendants and sales of the paints commenced." There is no evidence that there was such a shop as Danny's Paint Co., let alone that goods were released to such an entity.

There was a claim that monies collected from sales of the paints that were released should be accounted for to the plaintiff. On the findings I have made as to his allegation of contract, as opposed to the defendants' allegation of employment, there was no substance to that claim.

I therefore find that, in terms of the statement of claim and the prayers in that statement of claim, the first prayer, that is, seeking "an Order restraining the defendants from removing any paint from the containers and or selling any of the stock" should be dismissed.

220 Along with that, I intend discharging the interim injunctions which were made in similar terms, that is restraining the defendants. I intend discharging the interim injunction of the 8th December 1995 and the amended Order of the 12th December 1995.

It seems to me, on the evidence that I have heard and the conclusions I have reached, those interim injunctions cannot stand.

The second prayer for "judgment against the defendants in the sum of \$11,000" that is for monies allegedly collected from sales of paints, as I have already concluded, cannot stand.

230 "(c) An Order restraining the defendants from collecting any unpaid accounts for paints sold from the shop." I dismiss that application. Again the interim injunctions had some effect in terms of restraining the defendants from collecting unpaid accounts. In so far as those interim injunctions affected that aspect, as I have already said, those injunctions are discharged in their totality.

To the same effect is the 4th prayer "(d) restraining the defendants from entering and interfering with the business operated as Trident shop situated at Taufa'ahau Road." Again that application, that prayer, is dismissed.

240 I turn to the counter-claim that has been made. It has been twice amended. I find it still ill conceived insofar as I am as uncertain, as Mr. Edwards was in his submissions, as to exactly what is alleged. Is it just defamation allegations or something more than that?

Even if it is simply defamation, then it cannot possibly succeed because the alleged defamation is founded on what has been said in this Court. It seems to me that that must be privileged in any event.

If I look at the counter-claim as originally filed, paragraph 1 is a claim of "deliberate defamation" by the "allegations" of the plaintiff.

Paragraph 2 alleges a "loss of business to the first and the second defendants by his false allegations." I take that to relate back to the alleged defamation.

25:0 Paragraph 3 - "That all monies paid to the plaintiff must be paid back to the first and second defendants as they are the sole distributors and sellers of the Taubmans Paints Fiji Ltd". There is no evidence as to monies being paid to the plaintiff at all.

4: "That all stocks must be returned and/or paid to the second defendant". There is no evidence of this i.e. the plaintiff having any stock.

26:0 There have been amendments to the counter-claim and that now reads, as per the document of the 9th February of 1996. Paragraph (1) "the plaintiff has deliberately defamed the names of the first and the second defendants by (a) his allegations published in his affidavit made on the 12th December 1995." I pause there; that was for the purposes of these proceedings, it cannot be any foundation for this claim, "(b) saying to one Mr. Siamu, that the defendants are untrustworthy." There being no evidence as to that, whatsoever, that must fail.

"2. That the plaintiff has caused loss of business to the first and second defendants by his false allegations. The first and second defendants cannot sell the paints to their customers nor could they check the remainder of the paints at the container kept at Queen Salote Wharf or open the second defendant's paint shop at Railway Road Nuku'alofa." As I said that relates back, it seems to me, to the claim of defamation based on claimed false allegations in the affidavit used in the obtaining of the injunctions. It related to Court proceedings; it cannot succeed.

27:0 "3. That the first and second defendants through the allegations made by the plaintiff" - that seems to connect back, and I interpose these words, it seems to connect back to paragraph 1, - "have lost the following customers, (a) Oregon Pacific International (b) Franker Industrial Ltd (c) Tonga Timber Limited (d) Jewett Cameron." A witness was called from Oregon Pacific. There was no evidence adduced from him that any business had been lost as such to the defendants in any event; nobody was called from Franker, there was no mention of Franker in evidence whatsoever. There was a witness from Tonga Timber, but there was no evidence from that witness of loss of business or loss of customers to the defendants. There was no evidence as to Jewett Cameron.

28:0 "4. The loss of business suffered by the defendants through the withdrawal of the above customers are in the vicinity of tens of thousands." One is tempted to say "tens of thousands of what". There is no evidence called as to what loss, if any, was suffered by the defendants.

On the basis of the evidence before me I can find no support for the statement of counter-claim and it will be dismissed in all respects.

The position as to this container of paints has not being helped by somewhat contradictory letters which, seem to me, to have been written by Taubmans. You have only got to look at the Exhibits that were produced on behalf of the plaintiff as Exhibits F, H, I and J and compare them with the defendants' Exhibits at D.18, D.20 and D.21.

3 Taubmans are saying contradictory things to the different parties. It seems clear to me,

on the evidence I have heard, that indeed the arrangement over this particular container, which is the subject of these proceedings, that the contracts or arrangements were between Taubmans in Fiji and with the second defendant. It means that that container, in my view, is the property of the second defendant or rather the contents of that container, on the evidence I have heard and the findings I have made, are the property of the second defendant. It means, of course, the second defendant is responsible for the payment of the duties, taxes and so on and it means, of course, as well, that the second defendant is responsible to Taubmans for payment for the contents of the container (the 32,000 odd pa'anga worth of paints which is contained within it). The original terms seem to have been payment within 60 days. That debt has run over and it is that which has caused Taubmans now, as they have purportedly done, on the 29th of January 1996, to revoke or withdraw the distributorship from the second defendant.

It is of course over to the parties here and with Taubmans in Fiji, as to who Taubmans contract with in the future. That is not part of the role of this Court. The parties are free to contract with whom they wish.

The counter-claim will be dismissed. It seems to me, given the commencement of these proceedings by the plaintiff and the interim injunctions that followed, that the costs of these proceedings should be borne by the plaintiff and I will make an order for costs, either as agreed or as taxed, against the plaintiff and in favour of the defendants.

Just to complete the formalities, so everybody is aware the interim injunction of 8th December 1995 as amended by Order of 12 December 1995 is absolutely discharged. The application for committal for contempt is dismissed.