IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

C.1067/96

BETWEEN	:	SIONE SOAKAI	:	**Plaintiff**
AND	:	KINGDOM OF TONGA	:	**Defendant**

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : P. Muller for the plaintiff.
J. Cauchi for the defendant.

Date of Hearing : 30 November, 1-3 December, 1998.
Date of Judgment : 14 December, 1998.

JUDGMENT

In 1986, the plaintiff, Sione Soaki, owned a business that did slurry sealing of roads. Most of his work was on contract for the Government and, at that time, he estimated about 90% of his work came from the Ministry of Works. That situation continued through to 1990.

His main contacts in the Ministry were the Director of Works and the Road Engineer and, in a conversation with the latter, he was told the Ministry was having trouble with its machinery breaking down and that, if the plaintiff could obtain bigger equipment, he would be able to take on more Government contracts. The defendant does not challenge that the plaintiff was the only contractor capable of doing such work.

Mr. Soakai went to the Bank of Tonga to see if he could raise a loan in order to bring in the equipment and was told by Mr Matoto, the Manager Credit at the Bank, to obtain confirmation that he could do the work. At the plaintiff's request, the Director of Works then wrote a document in the form of an open testimonial on 20 November 1986 confirming that the plaintiff had carried out work for the Ministry and that his work was satisfactory.

Mr. Matoto accepted that as a satisfactory reference and carried out a number of credit checks with, inter alia, the other banks in Tonga. He agreed in Court that revealed the plaintiff was also seeking loans from the Tonga Development Bank at that time.

The plaintiff also sought and obtained a letter from the Road Engineer dated 29 September 1987. Although it is addressed to the Bank, the plaintiff agreed it was given at his request and he took it to the Bank himself. The letter stated:

"RE: SOAKI ROAD PAVING EQUIPMENT

This is to advise you that it is the intention of the Ministry of Works that most government jobs with respect to roading or bituminous sealing be let out to private contractors or enterprises.

The Soaki Road Paving Co. Ltd is the only private company in the Kingdom capable of executing such work. The Ministry has already let out some sealing works to this company under contract and they were completed satisfactorily. More works of this nature are lined up for this year and the years to come.

Slurry Sealing is one of the sealing works this company is expert of and am recommending any fund assistance required by this company for new equipment, be granted."

The Bank agreed to give the necessary loan for the plaintiff to purchase a larger slurry mixer, which he was able to use on various government contracts.

The plaintiff's case is that, towards the end of 1988, he was told the Ministry was no longer going to use slurry sealing and hoped to upgrade the standard of road sealing in the Kingdom. The plaintiff was advised not to sell the equipment he then had but that he should consider obtaining a hot mix plant. That was the type of work the Ministry were looking for and there was no machinery in the Ministry capable of doing such work.

The plaintiff made inquiries abroad and was eventually able to locate a supplier who could provide one of a size suitable for Tonga. He told the court that, at this time, he spoke to the Director and the Road Engineer who, he says, told him to try and get the mixer to Tonga.

The plaintiff again went to the Bank and asked for another loan. He was again asked to obtain a reference and some indication of the work that may be obtained for such a machine. Once again the Director of Works supplied a reference dated 17 February 1988:

"RE: SIONE SOAKAI BITUMEN MIXING AND PAVING PLANT

The Ministry do support the setting up of a Bitumen Hot and Cold Mix Plant together with paving equipment by Mr Sione Soakai. We see great merits in utilizing the cold mix for maintenance works and the hot mix for sealing of roads. With quality control, the plant should be able to produce higher quality paving materials.

At present the policy by M.O.W. is to tender out works to the private Sector. We foresee the proposed set-up by Mr Soakai as one of the required services in the Civil Engineering field and does complement the requirements of M.O.W."

When the plaintiff told the Director, the Road Engineer and an Australian adviser at the Ministry that he was bringing in the hot mix plant, the Director told him to advise the Ministry when it arrived in Tonga. He also wrote a letter to the Bank on 2 June 1989 that was delivered by the plaintiff:

.....

"RE: LOAN REQUEST BY MR SIONE SOAKAI

> In support of the above loan request for bitumen works, we do confirm for the 1989-90 Financial Year a total of approximately $1 million had been committed for road sealing works. The bitumen content would be in the order of $250,000."

The Bank agreed to the loan and the plaintiff was able to bring the equipment into the country in either June or July 1989.

Initially, no work came to the plaintiff from the Ministry so he went to see the Minister who gave instructions for the plaintiff to be given various small contracts to keep him working. These contracts continued through September, October and November of that year and the defendant has produced evidence, unchallenged by the plaintiff, that total payments by the Ministry of Works for the contracts over that period amounted to $43,372.40. The suggestion in the statement of claim that the Ministry was delaying payments is simply not true on the evidence of the payment vouchers.

The plaintiff then heard that the Government was planning to resurface Taufa'ahau Road from the intersection with Mateialona Road to the outskirts of Maui and he hoped to be able to use his hot mix plant to do it.

Yet again, the plaintiff needed financial assistance from the Bank to finance a larger sprayer and to purchase the tar required for this job. In support, he was given a letter, written by the Assistant Secretary on behalf of the Minister to the Bank and dated 30 November 1989:

> "I hereby certify that the Soakai Roading Company has been awarded all the sealing works of part of the Sia'atoutai – Nuku'alofa Road, running from the Mateialona – Taufa'ahau road intersection to the suburb of Nuku'alofa (Maui); the estimate of which is roughly $75,000/km.
>
> Mr Soakai will utilize his Asphalt Laying Plant in this undertaking for demonstration purposes as agreed to by His majesty, King Taufa'ahau Tupou IV.
>
> The term of payment is expected to be as follows:
>
> A certain percentage will be paid at the commencement of works and the rest at its completion. The Ministry of Works will decide that exact figures for these payments."

Subsequently he received a copy of the Privy Council decision in relation to this stretch of road in a letter addressed to him from the Prime Minister's Office dated 13 December 1989:

> "I am pleased to inform you that His Majesty's Council, in its meeting on 8th December, 1980 made the following decision:
>
> 'That Mr. Sione Soakai be approved to prime and hot-mix sealing the Hihifo road starting from Taufa'ahau intersection point with Mateialona Road (Mala'ekula) down to Maui (Kolomotu'a) as sample framework for His Majesty's pleasure.' "

The plaintiff told the court that, at this point, he was able to secure finance for the necessary materials and did so because he had no doubt, from these two documents, that he was to obtain the contract to do this work. The plaintiff understood the arrangement was that the

Ministry would prepare the road and the plaintiff would then do the hot sealing. However, on 21 December, he was given a letter to the Bank from the Minister to say that the sealing work for that road which had been scheduled to start that week had been postponed to the beginning of the next year "for technical reasons".

This would have been a substantial contract, estimated by the plaintiff to be worth about $150,000, and the plaintiff was disappointed to discover it was to be yet further postponed. Again at the plaintiff's request, a letter dated 29 January 1990 was written to the Bank by the Minister in the following terms;

> "I am sorry to inform you that, His Majesty's Council has changed its decision authorizing Mr Sione Soakai Paipa of Kolomtu'a to prime and seal (Hot Mix) part of the Hihifo road from Mala'ekula to Maui (ref: P.C.Decision No. 352 of 12 December 1989).
>
> The council however, has guaranteed that Mr Sione Paipawill undertake the sealing works for the Airport – Fua'amotu road. This road is funded by the Republic of China and a cheque of US$120,000.00 has been awarded by the Republic of China Ambassador for this purpose.
>
> Works on this project will start as soon as possible."

The wording of that letter is of some importance to the plaintiff's case because he told the Court that he considered it was saying that the work was his and he would be paid the sum mentioned. He explained that the Minister agreed that the new job "would maintain the same cost" because, although the Airport Road was narrower than Taufa'ahau Road, it was longer.

An agreement was drawn up and signed on 3 April 1990 stating the extent of the work to be carried out by the plaintiff and by the defendant and for an advance payment to the plaintiff. That payment forms part of the counter claim. The heading states that it is relates to the road to Fua'amotu Airport and the relevant terms are;

> "Both parties agreed to the following conditions.
>
> 1. The Ministry of Works will be responsible for the base course works on this road to a level satisfactory to Sione Paipa's company.
>
> 2. Sione Paipa's company will tar seal (hot milk) this road to a level satisfactory to the Ministry of Works.
>
> **Method of Payment.**
>
> Both parties agreed to the following:
>
> 1. That M.O.W. will make an advance payment of T$16,000.00 to Sione Soakai Paipa before commencement of the job and security will be the Hot Mix Plant which valued at about T$230,000.00.
>
> 2. Upon completion of the task, Sione S Paipa will reimburse to M.O.W. the amount paid in advance - T$16,000.00.

3. In the event that Sione S Paipa does not pay this money, M.O.W. take possession of the Hot Mix Plant for their use or sell the plant or part to recover their money."

The plaintiff asks the court to find that this document was a contract for the work and it is accepted that the advance of $16,000 was paid to him on 4 April 1990.

Just prior to this the Minister had advised the plaintiff that there was also to be sealing work on the next section of the Fua'amotu Road running from the Liku Road by the Palace to Fefe Beach and, on 28 March 1990, he wrote to the plaintiff in the following terms:

> "This is to advise you that the Hon. Acting Minister of Works has confirmed our discussion (Takai - Paipa) regarding sealing works for the Fua'amotu road i.e. that your Roading Company will do all the sealing works for this road starting from Fefe Beach to Liku Road for His Majesty's observation.
>
> The physical status of this road as at 23 March 1990 is as follows:
>
> Survey and clearing of road reserve completed.
> Grading of top soil in preparation for overlaying of base course was under way.
>
> With weather permitting, this part should be ready for prime sealing by mid April."

However there were even further delays in the work that the Ministry was to carry out and the Minister wrote to the Bank on 3 May, 1990, explaining that the delays were not the fault of the plaintiff.

On 10 May he wrote to the plaintiff stating that there would be further delays on the section from the Airport to Fua'amotu and, on 1 June, he wrote a letter for the Bank explaining that he was instructing the plaintiff to take over the surface preparation of the Fefe Beach Road from the Ministry of Works in addition to the final sealing work.

That resulted in a contract, signed on 8 June 1990, for the ground preparation. It set out the scope of the work and included provision for a part payment of half the agreed price at the commencement of the work with the balance payable at completion. The initial 50% amounted to $11,500 and was paid on the 11 June. On 2 July the contract was varied to allow part payment of the remainder before completion subject to agreement of both sides and the plaintiff was paid a further $5,750, in accordance with that variation, on 13 July.

The plaintiff had completed three quarters of the Fefe Road ground works and was engaged in work on the last quarter when all the work was destroyed by very heavy rains. The part he had completed had also been prime sealed in order to preserve it until the final sealing could be done. The latter process is part of the second process and, had the plaintiff sealed the road, would have been charged as part of the cost of that.

After the rain, the plaintiff's evidence is that he went to the Minister saying he needed more money to complete the job because of the effect of the rain and the Minister told him to wait. On subsequent visits he was told the same and he is, he told the court, still waiting. I do not accept his evidence that he was told to wait before completing the Fefe Beach Road ground

work. In the meantime, the defendant has completed the ground works on the Beach Road at a total additional cost of $21,280.

The defence called Mr Takai, the, then, Assistant Secretary to the Minister as its sole witness. He told the court that, after only one visit following the rain, the plaintiff never re-appeared and they were unable to find him to complete the Fefe Beach Road. It is clear on the evidence, that his recollection cannot be correct.

Just before the rains washed out the Beach Road work, the Minister instructed Mr Takai to write and advise the Director of Works that the Ministry must purchase all bitumen and emulsion from the Plaintiff. The reason given was:

> "...that in view of all the letters of encouragement issued by this Ministry for the procurement of Mr Soakai's plants/equipments and bitumen stocks, we are indirectly responsible for his current situation. We are therefore morally obliged to assist him in whatever way we can."

As a result of that memorandum, the Ministry paid the plaintiff $34,662 for bitumen on 28 September and, in October and November of the same year, he was paid $3520 and $5016 for other road patching work awarded by the Ministry.

When Mr Takai spoke of his efforts to locate the plaintiff, he was looking for him to finish the Fefe Beach Road ground work. The Ministry, in the meantime, went ahead and completed the sealing work on the Airport Road that had been allocated to the plaintiff. Mr Takai told the court that this was done because the plaintiff had failed to finish the Fefe Beach road and so "he was not given authority to go on" and complete the airport road. A memorandum of 30 March 1990 provides some confirmation for this linking of works on the two sections of the Fefe to Airport Road and is from the Minister to the Director of Works, copied to the plaintiff:

> "RE: SEALING WORKS – AIRPORT – FEFE ROAD
>
> I wish to advise you that the Hon. Acting Minister of Works has directed that the Ministry of Works will do the base course works while the Soakai Roading Company will do ALL the sealing works for the above said road starting from the section from Fefe Beach to Liku road. This section must be completed before moving to the second section i.e. Liku Road – Airport."

The plaintiff explained to the court that, although he carried out a few small contracts for other Government departments and private individuals, his business effectively finished operating at about this time - shortly after the rains had destroyed the Fefe Beach Road work and , on 21 March 1991, following an approach by him to the Director of Works, the plaintiff's solicitors asked if the Ministry would purchase the cold and hot mix plant, bitumen sprayer and hot mix paver for a total of $263,000.

Despite advice to the contrary by a consultant and the Chief Engineer that it would be unwise for the Ministry to buy the equipment, the Ministry, on 5 September 1991, offered $100,000 for the cold and hot mix plant. The sprayer was too small for their purposes and the paver was incomplete and not operational and so they were no included in the offer.

The plaintiff did not accept the offer. That was an unfortunate decision. The Ministry had already advised the Bank that it was allocating $2 million to the purchase of heavy machinery for road construction and the plaintiff should have known from his initial inquiries that the relatively small size of the equipment made it unattractive to most overseas buyers.

There is very little dispute over any of the facts set out above. The case depends on the meaning and effect of the various contacts between the defendant, the Bank and the plaintiff.

In a repetitive and unnecessarily lengthy statement of claim, the plaintiff sues for negligent misstatements, misrepresentations and breach of contract.

The first 30 paragraphs plead that as a result of those misstatements, misrepresentations and breaches of contract, the plaintiff was in debt to the Bank of Tonga to the extent of $206,243.13 and to the Tonga Development Bank for $42,502. Both sums are claimed as special damages. The same misstatements, etc resulted in the plaintiff's equipment becoming redundant and the value of $223,014 is claimed for that. The loss of profits on the Hihifo Road, the Airport to Fua'amotu Road and the Fua'amotu to Fefe Beach Road projects, placed at a total of $123,000 are also claimed.

Paragraphs 33 to 44 set out the misstatements that are alleged to have resulted in these losses and repeats the sums claimed with the exception of the head for the value of the redundant machinery. Paragraphs 45 to 54 set out the misstatements allegedly leading to the Fua'amotu project losses and claims the same sums as paragraph 44. Each of these latter sections are headed as further causes of action but they are in fact particulars of the general allegations in the first part.

The defendant counterclaims the sum of $21,280 for the completion of the Fefe Beach Road and the $16,000 advanced to the plaintiff for the Airport road.

The plaintiff has a number of difficulties with his claim.

First, there is no evidence to suggest any of the defendant's communications caused the loan to the Tonga Development Bank and that part of the claim must fail.

Second, in terms of the claim for breach of contract, there is only one contract shown in the evidence and that is the contract for the first part of the Fefe Beach Road work. In itself it is a scant document but I am satisfied it forms a contract. Unfortunately for the plaintiff it is a fixed sum contract and the work was not completed. The plaintiff was undoubtedly treated very harshly by the weather but he has not pleaded frustration - wisely in a construction contract where the work was destroyed by heavy rain in a country where sudden and very heavy rain is always a possibility. The plaintiff does not deny that he failed to complete and has received $17250 advance payment for the work. Had the plaintiff finished the work the Ministry would not have had to pay the $21,280 counterclaimed but it would still have had to pay the balance of the contracted sum, namely, $5,750, which must therefore be deducted. The defendant therefore succeeds in the counterclaim on this part to the extent of $15, 530.

The only other document the plaintiff suggests is a contract is the document, signed on 3 April 1990, in which it was agreed that the plaintiff would tar seal the Airport Road and would receive an advance payment of $16,000. It is pleaded that this was a contract to carry out the sealing work on the Airport Road and that it was a term of that contract that the sum

of $16,000 was to be paid as security to the plaintiff. It is also claimed that it was an implied term of that contract that the defendant would carry out and complete the works to enable the plaintiff to seal the road.

That document does not constitute a contract but I am satisfied, on balance, that it is a precontractual agreement to the effect that the plaintiff was to do that work. The question is whether there is a clear intention shown in the agreement to create a contract. The defendant urges that this falls far short of a contract and is not enforceable; the terms, specifications and scope of the work are not stated, there is no price agreed or even suggested and it is silent on date and time. I disagree. The wording of this document shows a clear agreement between the plaintiff and the defendant in relation to this road and to the part each was to have in the project. The defendant was sufficiently resolute to agree to commit $16,000 to the project and the plaintiff sufficiently sure to pledge his most expensive piece of equipment. I am also satisfied on the evidence that the plaintiff had previously given an oral estimate of the cost of all such work per kilometre. The important test is whether the evidence shows an intention to create a binding agreement. This was not simply a contract to enter a contract nor a mere agreement to negotiate. It went beyond that and I am satisfied it is enforceable. However, although the plaintiff claims $48,000 loss of profits (which on his profit margin would suggest a contract price of $320,000), no evidence has been led of the actual cost.

I am satisfied that the defendant did carry on and do the sealing of this section and the plaintiff was unable to do it. I am not satisfied that the reason for this was that the contracts were considered interdependent. It was more a case of simply taking no regard of the earlier agreement to give the work to the plaintiff. On the other hand, I accept that the plaintiff did nothing after the rains to try and pursue the agreement. There is no evidence he was ready or able, at that stage, to do the work. What evidence there is points the other way – to a man whose enthusiasm, as Mr Matoto put it, was no longer there. His claim for loss of profit is too remote and fails.

However, the counterclaim also fails. The advance of $16,000 was to be repaid on completion of the work. The actions of the defendant made that an impossible term for the plaintiff to keep. There is no evidence the defendant ever sought to pursue the plaintiff for possession of the hot mix plant to mitigate its loss. By its own action, the defendant rendered the terms of the advance impossible and the counterclaim fails.

The main thrust of the plaintiff's claim is that his financial position was the result of the defendant's negligent misstatements and misrepresentations. I do not need to identify the alleged misstatements and misrepresentations in relation to each part of the claim and the three main projects; that is set out in the statement of claim. The plaintiff claims that the assurances of future work contained in the various communications with the Bank and himself induced him to seek to borrow heavily to purchase the equipment and the Bank to agree to advance the money sought. It is further claimed that the "contracts and representations by the defendant as to the Hihifo Road works ... Fefe – Liku road works and Airport - Fua'amotu road works never eventuated"

There is no doubt that a person can be held responsible for negligent misstatements causing another to act to his detriment. If a party gives information to another who has sought it from him as an authoritative source and he gives it knowing it will be considered reliable and acted upon, he may be liable for any detriment caused by its inaccuracy.

However, I am not satisfied the defendant could be considered to be in such a position to the plaintiff at any point. The main representations relied upon by the plaintiff were made to the Bank at the plaintiff's request. If the Bank was misled by them such as to cause it to act to its detriment, that may give rise to a separate cause of action but the Bank is no party to this action. Whilst I accept the plaintiff was hopeful of work from the Ministry, I do not accept on the evidence I have heard, that he had such belief in their statements about future work that he went ahead with his loans only because of them. Asked in Court he agreed he realised none of them, with the possible exception of the Privy Council decision, actually promised anything.

The Ministry owed him no duty such as might give rise to a claim. Over and over again, he was asking them to send another note to the Bank to reassure its officers so they would not stop lending further sums or call in his previous loans.

As far as the Privy Council decision is concerned, I accept the plaintiff and the Bank felt that contract was as good as settled. It was not. The whole episode was unfortunate; for the plaintiff, it was tragic. However, the Ministry did give him work in place of that contract. The Airport Road sealing was a direct consequence of the Minister's appreciation of the effect on the plaintiff of the cancellation of Hihifo road and that it left them with a sense of responsibility. Had the Airport and Beach Road projects gone through, they would have left the plaintiff's finances in a very different state. They did not but that was not the result of the change in the Privy Council decision. The most the plaintiff may have claimed for the Hihifo Road project was any damages caused by the delay before he was granted the Airport Road work in its place.

Taking the communications and representations as a whole, they amounted to no more than statements that work was likely to be available to the private sector and that such work was likely to be awarded to the plaintiff. I do not accept it was any more specific than that. In fact the Ministry did give the plaintiff substantial work during the initial period. Reference has already been made to the $43,372 paid during the last few months of 1989. Despite the postponement of the Hihifo Road project, and in place of it, he was offered work worth something in the region of $320.000 (Airport to Fefe sealing) and given a contract worth $23,000 (Fefe Beach ground work). His claim the contracts and representations in relation to these projects never eventuated is not accurate. As has been stated, the postponement of the Hihifo Road project lead directly to the offer of the Airport Road in its place. The failure of that was not any misrepresentations by the defendant but the plaintiff's own failure to perform.

Even after the disaster of the rains in mid 1990 and despite his failure to complete the Beach Road ground work or take any steps to pursue the Airport Road sealing contract, the Ministry took $34,662 worth of bitumen off his hands because they knew he had purchased it in anticipation of the Hihifo Road project and also gave him two patching contracts worth $8,536. These were not hot mix work but it hardly supports the plaintiff's contention that they did not keep to the representations and assurances made to him and to the Bank.

Even if I had found the plaintiff established a duty of care on the Ministry in relation to him, I would consider the evidence of contracts awarded during late 1989 and through 1990 defeats his claim they were misstatements. The way the Ministry officials wrote letters to the Bank and, in particular the Minister, conducted the allocation of work may have left much to be desired but there can be no doubt they tried very hard to assist the plaintiff at a difficult

time. Even the next year the offer of $100,000 for his mixer, so misguidedly declined, was clearly made to try and help him with his financial problems.

I do not find the plaintiff has proved a special relationship that imposed any duty on the defendant. Neither do I find the various statements cited were misstatements, with the exception of the communication to him of the Privy Council decision, or misrepresentations negligently made. I do not find either he has proved that they caused him to act to his detriment.

The plaintiff cited the case of Meates v Attorney General, (1983) NZLR 308, in support of his claim. That case placed clear responsibility on the Minister involved and I respectfully accept the reasoning of the learned Judges of that Court. However, I distinguish this case because the New Zealand Minister effectively gave direct advice that resulted in the plaintiff acting to his detriment.

That was not the case here. The fact some of the letters produced to the Court were written on the direct authority of the Minister clearly gave them additional weight and I can only say that he acted unwisely but those representations were made to the Bank and not to the plaintiff. Similarly, I consider they fall far short of the direct advice given in Meates' case.

Thus, the plaintiff's claim fails.

The defendant's counter claim for return of the $16,000 advance on the Airport Road project fails but I give judgment to the defendant for the sum of $15,530 in relation to the Fefe Beach Road.

The plaintiff must pay the defendant's costs in the claim.

Although the defendant has succeeded in part of the counter claim, I shall make no order for costs in relation to that.

I note the Court of Appeal made no order for the costs of the appeal and left the costs of the earlier litigation to the Judge hearing the next trial. I propose, in view of the result of that case and the comments of the Court of Appeal upon it, to make no order for costs in those proceedings - as was suggested, very fairly, by counsel for the defendant.

SUPREME COURT TONGA

NUKU'ALOFA: 14 December 1994 CHIEF JUSTICE