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

NO.C.304/93

BETWEEN : RAMANLAL AND SONS LIMITED - *Plaintiff;*

AND : TETA TOURS LIMITED - *Defendant.*

BEFORE THE HON. MR JUSTICE FINNIGAN

Counsel appearing: Mr Niu for Plaintiff,
Mr Vaipulu and Mr Lemoto for Defendant.

Dates of Hearing: 13, 14 January 1999
Submissions received: 19 February & 26 February 1999
Date of Judgment: 11 March 1999

JUDGMENT OF FINNIGAN J

INTRODUCTION

These are competing claims between two parties that formerly for many years did business together. In the course of their businesses, for more than ten years, each used the services of the other and each rendered monthly accounts to the other. Instead of settling these accounts by monthly payments, they balanced the respective debts and allowed each other equal credit to cancel whichever debt was the less, and the party still owing paid that balance to the other.

Now the arrangement has ended, indeed it ended in 1992, and the parties since then have attempted to assess by a final accounting which party still owes the other. This is largely a question of fact, although there is room for application of the law of principal and agent. The fact situation is not itself complex, but the litigation has been lengthy and has been complicated by deficiencies in the documentary evidence. The parties have twice abandoned trials part-heard in order to settle, and have had four separate hearings in the Court. There was even a hearing, on 26 and 27 October 1998 to determine whether or not the parties had settled the matter. After determining that they had not, the Court insisted that the parties either settle or come to a final hearing.

As may be imagined, the absence of some documentary evidence has been a disadvantage to the Court as well as to the parties in the final determination of the issues, but from the evidence which has been presented, a well-founded resolution is possible.

THE COMPETING CLAIMS

The services provided by the plaintiff to the defendant were in the form of accommodation for Hawaiian Airlines passengers. The services provided by the defendant were in the form of Hawaiian Airlines tickets for officers and employees of the plaintiff, and in addition, tours and airport transfers for the plaintiff's employees and for customers.

The claim and counter-claim as amended and litigated in this final hearing are simple enough. The plaintiff claims that it owes the defendant $20,495.73, and that the defendant owes it $29,665.08, and sues for the balance, $9,159.35. The defendant admits that the plaintiff owes it $20,495.73, and denies that it owes $29,665.08.

In its amended counterclaim the defendant claims $26,221.25. It wholly relies on some calculations that were made by a committee of two accountants appointed, one by each party, during the course of the litigation and in one of the attempts to settle. The two accountants calculated that the total amount owing by the plaintiff to the defendant is $26,221.25. In its pleading the defendant overlooks the sum calculated as due by itself to the plaintiff, which is $469.53. It does however admit liability for this amount, and so its counterclaim must, if successful, be offset by that amount, to $25,751.72.

Each party seeks interest at 10% if awarded judgment, and costs.

In his closing submissions, Mr Niu on behalf of the plaintiff continued the plaintiff's admission of only $20,495.73, identifying that sum as the amount due for Hawaiian Airlines tickets bought by the plaintiff. There were however other services purchased by the plaintiff, i.e. tours and airport transfers for its customers and staff, and the quantum of the plaintiff's debt was fixed at $26,221.25 in a detailed process by the accountants appointed by the parties. The parties had terminated part-heard a previous hearing of these claims in order to have the accountants assess as accurately as possible what each owed the other, with a view to settling the claims out of court. The assessment that they did was not just a balancing-out. It was a calculation of the parties' indebtedness from an independent assessment of all the invoices that the parties were able to make available to the accountants. I heard evidence from one of the accountants in an earlier hearing, in October 1998, and I have assessed their conclusions for myself. I cannot find any basis at all in the evidence for rejecting or amending their findings. Theirs was the first and best assessment that was carried out.

The accountants found that the plaintiff owes $26,221.25, and that only $16,969.06 is owed to the plaintiff, and they assessed the defendant's part of that debt as being only $469.53, with $16,499.53 payable by another party not yet mentioned, Hawaiian Airlines. The plaintiff does not accept that assessment of what it owes, and it does not accept the accountants' assessment of the debt owed by the defendant.

Hawaiian Airlines has become defunct, and cannot pay the plaintiff. The plaintiff proceeds on the footing that the defendant, while agent for Hawaiian Airlines, incurred the debts that the plaintiff claims are owed, in its own name. The plaintiff also alleges that Hawaiian Airlines, before becoming defunct, paid to the defendant the sums which it now claims, and on both grounds seeks payment from the defendant. However, the major cause of difficulty throughout has been that the plaintiff's attempts have failed to produce primary evidence of the claimed payments by Hawaiian Airlines to the defendant. Another difficulty for the

plaintiff has been its inability to produce evidence of quantum of the respective debts which overpowers the calculations of the two accountants.

The assessment undertaken by the accountants was not only expert, it was done on examination of all the available accounting evidence. Unless the plaintiff has shown some errors in that assessment, it has given the Court no basis on which to try to do better what the experts have already done.

THE ISSUES

In essence then, the two issues are whether the defendant owes the plaintiff more than its admitted $469.53, and whether the plaintiff owes more than its admitted $20,495.73. In the light of the pleadings and the closing submissions of both counsel I settle the issues in the following form:

1. Does the defendant owe the plaintiff $29,655.08? What the plaintiff is seeking is reimbursement for accommodation supplied to Hawaiian Airlines passengers at the request of the defendant. The defendant denies liability, on the ground that, although it was Hawaiian Airlines' agent, the plaintiff was always dealing direct with Hawaiian Airlines for payment. The accountants, upon whom the defendant relies in its counterclaim, have assessed the defendant's debt, on the facts but not on the law, as $469.53.

2. Does the plaintiff owe the defendant $26,221.25? This is the sum assessed by the accountants as the plaintiff's debt to the defendant. The plaintiff admits $20,495.73, but the accountants assessed the higher amount. The plaintiff admits the lower amount on the footing that it dealt with the defendant direct for purchase of airline tickets.

The plaintiff's position is that the dealings of the parties throughout were direct dealings, creating contractual relations between them. Hence its claim is for only the balance due in an equalising process. The defendant's position is that when requesting accommodation it was only the agent and was not liable for payment, and did not pay, while in the supply of airline tickets it was contracting direct with the plaintiff and demands payment from the plaintiff.

In response to the plaintiff's claim, the defendant submits that the airline's accommodation vouchers were usually sent by the plaintiff direct to the airline for collection, and were not paid by the defendant. The evidence of the plaintiff's witness however is that the accommodation costs were paid by the defendant with is own cheque, whether or nor it had had reimbursement from the airline. A letter dated 7 August 1992 from the defendant to the plaintiff was produced in evidence. The letter, and the plaintiff's response dated 9 October 1992, seem to show clearly a course of conduct whereby the defendant paid to the plaintiff money due both on its own account and on account of Hawaiian Airlines. As both letters stated, the defendant was invoicing the airline for the money claimed from it on the Hawaiian Airlines' account by the plaintiff, and was paying the Hawaiian airlines account with funds provided by the airline. There is confirmation of this in another letter that was produced, although written after these proceedings were commenced. In this letter dated 3 May 1994 written to plaintiff's counsel, the financial controller of the airline stated that for payment of all its creditors in Tonga the creditors billed the defendant, and the airline provided funds to

the defendant, which paid the creditors using its own accounts and cheques. I note but do not rely upon the airline's letter, even though it was written in the course of preparation and for the purposes of these proceedings, because it is not necessary to do so.

The plaintiff comments, not unreasonably, that the counterclaim contradicts the defendant's denial of liability for the accommodation, because if as agent of Hawaiian Airlines it was not liable to pay for Hawaiian Airlines' accommodation then as agent of Hawaiian Airlines it is not entitled to collect the debt due for tickets. Its submission is that the defendant in selling the tickets was contracting on behalf of the airline, which provided the service to the plaintiff, and cannot sue to recover for itself the money owed to the airline.

The defendant responds that it is entitled to recover the ticket money for itself because, as the evidence showed, it was selling travel to the plaintiff (and to other travellers) by a credit arrangement. Its witness said in evidence that this was an arrangement between the defendant and the plaintiff. It sold the airline's tickets to the plaintiff without requiring payment and thereby allowed credit to the plaintiff so that the persons travelling could travel even before payment. The defendant was agent for the airline under a general sales agreement. The defendant's witness said that the general sales agreement, and IATA regulations, (neither of which I have seen) required payment to the airline on a strict and frequent basis, for every ticket sold. The letter from the airline confirms that. To comply with the general sales agreement and retain its agency, the defendant says it was paying the airline for the tickets on their due dates from its own funds. The evidence does not disclose whether the plaintiff knew that the defendant was paying for the tickets itself, but the defendant says that as an agent under a general sales agreement with the airline it was required to pay and did pay, and that what it seeks is reimbursement for itself.

THE QUESTION OF LAW IN THE FIRST ISSUE

I turn now to the first issue. The question is whether in the circumstances of this case, where the defendant was agent for Hawaiian Airlines in arranging accommodation, the plaintiff can sue the defendant to recover the accommodation charges.

The defendant has submitted on this point that the defendant has not had money from the airline for payment of these costs, and that it never stated or accepted personal liability. The plaintiff's submission is that this is one of those cases where the agent may be held liable on a contract made by the agent as agent. To establish the point at law, it relies on the facts. On its behalf, Mr Niu points first to the long history of the parties' dealings. For ten years or more they exchanged services with each other and paid each other in credits with cash payment of the balance. Included in these general dealings were some direct party-and-party dealings, the defendant providing transport for the plaintiff's guests and staff as required and the plaintiff being liable for payment. The accommodation services were kept distinct in their accounts, as is shown by their letters of 7 August and 9 October 1992, but this, in his submission, was because the defendant's payments for accommodation of Hawaiian Airlines passengers were invoiced not only by the plaintiff to the defendant, but by the defendant to the airline, because the airline reimbursed the defendant. Over the ten years, in his submission, the plaintiff had looked only to the defendant for payment. Confirmation of that fact, he submitted, is given by the airline itself in its letter of 3 May 1994. In that letter, the airline financial controller stated that the airline provided the funds to the defendant but the defendant made the payments through its own accounting system. She stated that all sums claimed from it by the defendant under the general sales agreement, for such payments as the

plaintiff's claim had been paid to the defendant. There was, Mr Niu pointed out, no airline invoicing for the airline tickets, because the airline was not involved. The arrangements were between the plaintiff and defendant alone.

It needs also be said, but just in passing, that if, as the airline financial controller said, the airline has already paid the defendant (of which the plaintiff has tried in vain to find evidence), then the plaintiff has a good claim for money held on its behalf by the defendant. That however as a cause of action in these proceedings, I expressly put aside.

For payment from the defendant for the supply of accommodation, the plaintiff relies upon the general principle of law stated by Atkin LJ in *Ariadne SS Co Ltd v McKelvie & Co* [1922] 1 KB 518, at 535-6, and in particular the following dictum at 536:

> "In a case where there is doubt whether a party contracting as agent intends a qualified assent, i.e. assent on behalf of the principal only, or an unqualified assent, i.e. assent on his own behalf also] you must look to the body of the contract to see whether [that person] was intended to be a party or not. If the contract does not purport to be made with him, but with some one else, or uses words which make it plain that the only contracting party is [that person]'s principal....[that person] will not be chargeable."

In Mr Niu's submission, the circumstances show that the parties were contracting in a contra arrangement for an exchange of services, each in its own name, even though the services involved the clients of the defendant's principal. He points to the evidence of the main witnesses for each party, that the object of the arrangement was to reduce the transfer of actual cash between them for mutual services supplied, and he submits that, in making the arrangement to contra the charges for accommodation, even though the funds for that were supplied by its principal, the defendant was making itself a party to the contract for supply. He relies upon the following dictum of Lord Scarman in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, at 795:

> "The true principle of law is that a person is liable for his engagements (as for his torts) even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability."

In my opinion, far from negativing its personal liability in making the arrangement which it did, the defendant assumed liability. The contract which it made, and for many years carried out, was that it would provide commercial services for the plaintiff (transport and airline tickets), and would accept in payment a credit against what it owed the plaintiff for services (accommodation when it required it for its airline agency customers). It seems to me that the plaintiff was entitled to sue on that contract had the defendant not honoured it, and, had the defendant wished, it could have joined the airline as a third party or claimed in turn under its own contract with the airline.

In my assessment therefore, in making their contra arrangement, the parties made a contract between themselves, upon which one could sue the other and establish liability. They did business under this contract for more than 10 years. The claims now raised by the defendant for protection under the law of agency are ill-founded.

I turn now to the second issue, the debt claimed by the defendant from the plaintiff. The parties agree in the pleadings that the services supplied by the defendant to the plaintiff were not just airline tickets, but included transport services. The plaintiff as an integral part of its claim has admitted liability in contract for a debt to the defendant, but has not admitted the

quantum sought by the defendant. The basis of the admission as to liability is the plaintiff's assertion that each party contracted directly with the other, and that the debit accrued by each is a debt by one to the other in contract. The basis of the defendant's claim for more than the plaintiff admits, which is set out in the amended statement of defence and amended counterclaim, is simply that the higher amount is what was calculated when the accountants made the assessment. The defendant does not challenge the plaintiff's claim that the parties are in a set-off situation, or advance any other claim in law to support its counterclaim. The plaintiff argues in submissions that the counterclaim must fail. This is because the defendant, in both its amended statement of defence and in its amended counterclaim identifies Hawaiian Airlines as its principal. Thus, in the plaintiff's submission, it is claiming as agent, even though it says it is not. The plaintiff submits that when it sold the tickets it sold them as agent, and as agent it cannot recover for itself the debts of the principal.

I find however that the counterclaim has the same basis as the claim - simple contract between principals. The difference is only in quantum. Thus, in respect of the plaintiff's debt to the defendant, the defendant's counterclaim is admitted by the plaintiff except as to quantum.

This becomes clear on examination of the facts. What was the relationship between the parties in the provision of the transport services by the defendant, and in the provision of the airline tickets? In the provision of transport services, there is no room for doubt. There was a direct party-and-party contract relationship. In the provision of airline tickets also, I have no doubt that the relationship was the direct relationship. It was a relationship whereby the defendant provided airline tickets of its principal Hawaiian Airlines, not on the terms of Hawaiian Airlines, but on its own terms. The defendant, by the evidence of its own witness, satisfied the airline with payments from its own funds, and had a separate contract for payment with the plaintiff. Putting that a different way, the defendant acted outside the terms of its general sales agreement when selling Hawaiian Airlines tickets to the plaintiff, and thus outside the terms of its agency. In consideration of the supply of Hawaiian Airlines tickets to the plaintiff without requiring prompt payment, it created its own contract for payment direct with the plaintiff. In my opinion, if ever unpaid by the plaintiff on their agreed credit terms, the defendant was always entitled to sue for payment on this contract, just as the plaintiff is suing now.

DECISION OF THE CLAIM AND COUNTERCLAIM

On that basis therefore, the competing claims of the parties as to liability are to be resolved in this way. The defendant is liable to the plaintiff for the costs of the plaintiff's services in supplying accommodation for Hawaiian Airlines passengers. The plaintiff is liable to the defendant for the costs of the defendant's services in supplying transport and airline tickets.

Turning to quantum, I can say only that no better basis for assessment of the quantum of each party's debt has been supplied to me than the report prepared by the two accountants. I accept that assessment, and find that the amount owed by the plaintiff to the defendant is $26,221.25. The evidence does not support the lower amount admitted by the plaintiff. I find that the amount owed to the plaintiff by the defendant is the total of the two sums assessed by the accountants as due to the plaintiff, namely ($469.53 plus $16,499.53), i.e. $$16,969.06. The evidence does not support the higher sum claimed of the plaintiff. Offsetting the lesser sum against the greater, I find that the balance is a sum of $9,252.19, that sum being payable by the plaintiff to the defendant. Judgment is entered accordingly for the plaintiff on its

claim, in the sum of $16,969.06 and for the defendant on its counterclaim in the sum of $26,221.25. The plaintiff is to pay the defendant $9,252.19. Interest will run on that sum at 10%, the rate sought by each party, from the date of this judgment until paid.

COSTS

The plaintiff has been successful in its claim and the defendant successful in its counterclaim, but the plaintiff is liable to the defendant. I have considered the merits of the actions of both parties in conducting this litigation. In all of the circumstances, I decline an order for costs.

NUKU'ALOFA, 11 March 1999

JUDGE