

BETWEEN : **TEVITA FIFITA** - **Plaintiff;**

AND : **1. TEU VINCENT** - **First Defendants**
2. GEORGE VINCENT - **Second Defendants**

BEFORE THE HON. CHIEF JUSTICE WARD


Counsel: *Mr Tomasi Fakahua for the Plaintiff*
First Defendant in person
Mr V. Foliaki for the Second Defendant.

Date of Hearing : *7th & 8th December 1999.*
Date of Judgment: *13 December 1999.*

JUDGMENT

In September last year, a container load of cassava grown by the plaintiff was shipped to New Zealand. On arrival, it appears it was rotten and had to be destroyed. This action is concerned with the events leading up to the shipping of that container and the agreement between the parties.

The plaintiff is a police officer but describes himself also as a commercial farmer. The defendants are wife and husband. The first defendant is Tongan and the second, very much her senior in age, is a retired engineer from England.



The plaintiff's case is that he sold the cassava to the defendants for \$20.00 per 20kgs bag. It was to be prepared by him and frozen in a refrigerated container. The agreement was that, when it was ready for shipment, they would pay him for the crop. The statement of claim refers to 562 bags but in evidence the plaintiff claimed 574 bags. The manifest shows there were 482 bags containing 20 kgs and 185 containing 10 kgs making a total of the equivalent of 574.5 bags.

The first defendant conducted the proceedings in person. The defence filed admits she agreed to buy the plaintiff's cassava but alleges this was done only after "being continually pestered by the plaintiff to buy" it. Her defence also states that the second defendant had no part in the transaction except to help, out of compassion for her position, with the final stages of the transport of the container to the wharf. She did not give evidence or call witnesses.

The second defendant did give evidence. His case is that he was nothing to do with this transaction. Although he was involved in the movement of the container, he was never party to any agreement and owes the plaintiff nothing.

Before going into the evidence in detail, there are two aspects that should be mentioned. The first is that the evidence of the plaintiff was left substantially unchallenged in cross examination by counsel for the second defendant although, from the tone of his defence and the evidence he later gave, it was clearly hotly disputed. I accept the intention was to challenge it but the plaintiff did not, as a result of counsel' failure to put these matters to him, have a chance to answer some of the details of the dispute and I allow for that.

The second matter is that I am unable to say that I can treat either the plaintiff or the second defendant as completely credible. I am satisfied both have lied on some aspects of the case.

The plaintiff stated in his evidence that the first defendant had approached him. She had been in a taxi and asked him about his cassava. She said they were looking for cassava to export and asked to go and see his crop. They went in the taxi and she offered to export it. It was arranged that they would meet at her 'api the next day and, on that day, 9 September 1998, he went to the house. Both defendants were there. He described how they sat by a table and discussed the whole transaction. The second defendant said that they had a business exporting cassava to New Zealand for starch manufacture and that they only exported one container per month. During this discussion the price was agreed and an arrangement made that the defendants would pay for the container and supply empty bags but the plaintiff would wash, peel and freeze the cassava.

It appeared the second defendant was leaving for New Zealand the following day to await the arrival of another container he had shipped previously. On that morning, the plaintiff returned to the house and they all went together to Pacific Forum Line to arrange a container. There was no container available and so the plaintiff and the first defendant went the next day to Union Shipping and Dateline Shipping where they were eventually able to obtain a refrigerated container. At that time she asked him to lend her \$40.00 saying her husband would repay it on his return. They then went to collect the bags.

It was not until 14th that the container was delivered to the place where it was to be loaded. The plaintiff started loading his cassava into it the following day and had finished by 18th.

On the 16th he described going with the second defendant, who had returned from New Zealand, to record the number of the container. That and most of the subsequent events described by the plaintiff are clearly challenged by the second defendant although the plaintiff was not cross examined on most of them.

The plaintiff said that, when the container was full he went to the defendants' home during the afternoon of 18th and told them. The second defendant then went with the plaintiff in his car to the ANZ to collect the money. However, he came out of the bank and said the money had not arrived and suggested they went to Cable and Wireless so he could send a facsimile to the UK to find out why the money was late.

They then went to the shipping company office to collect the documents needed. The second defendant asked the plaintiff if he could borrow \$150 and would pay it back later. The plaintiff withdrew that amount from his savings account and produced the passbook in evidence to confirm a withdrawal of that amount on 18th.

The following day, Saturday, the second defendant went with the plaintiff to collect the container and deliver it to the wharf. Once there he took it to quarantine and arranged the phytosanitary certificate and the delivery of the container to the shippers.

On Monday, 21st, the two men again went to the shipping office to make the final arrangements and the second defendant said he would once more fax England to find out where the money was.

The plaintiff again went to the defendants' home on 24th and found the second defendant again about to leave for New Zealand. The latter said he would sign a letter of authorization to his wife to withdraw the sum owed and signed a withdrawal slip for the ANZ. He left for New Zealand and the next day the

plaintiff and the first defendant went to the ANZ. She went inside but returned to say there was still no money.

She promised the money would be available on the Monday, 28th, and her husband would be back by then. However, the second defendant returned on Saturday, 26th, and, when the plaintiff went to his house, suggested they again go to Cable and Wireless to send a fax and this they did. The following Monday they all went to the ANZ and again the money was not there. The second defendant said the plaintiff should return in the afternoon and, when he did, he was told that the money had still not arrived but that the defendants had \$1,300.00. The second defendant said they would pay that and pay the balance later. They were at the table in the defendants' house and the money was in a bag. The plaintiff told the court that the second defendant told his wife to count it whilst he recorded it in a book. He accepted that money as part payment.

Yet again the plaintiff went to the house the next day and was, this time, told the money would be there by 5 October. However, when the plaintiff returned that day, the second defendant was there on his own and showed a complete change of attitude telling the plaintiff he was nothing to do with the container and that the plaintiff should get off his 'api and never set foot on it again.

The following day, the plaintiff went to his lawyer.

In cross-examination, the first defendant challenged the plaintiff's suggestion that her husband was anything to do with the arrangement. The plaintiff hotly disputed this.

The second defendant gave evidence. He denied any involvement in the transaction or any knowledge of it beyond the mere fact that his wife had entered into it. He was firm and forceful in his answers and pompous in his attitude.

He told the court that the plaintiff never spoke to him initially. He said his wife told him the plaintiff had some cassava to sell. He continued, "I said I had no money to buy his cassava and I wanted nothing to do with him or his cassava.... I never talked about buying his cassava. He knew I was going to New Zealand via Fiji and if he thinks I would agree to commit myself to an expenditure of \$20,000.00 and then jump on a plane, he is very foolish. I am a businessman."

That effectively summarised his case. He said that he suspected his wife and the plaintiff were 'going behind his back' and arranging a container. He also felt, as his wife claimed in her pleadings, that she was under some pressure to buy. As a result, when they first went to Pacific Shipping he told the manager

that if he released a container to his wife or the plaintiff he would have nothing to do with it.

When he returned from New Zealand, he saw his wife on 17th and asked her what was going on. He recounted in evidence that he told her she was very naughty to disobey and her response was to say that she would finance it and carry on.

Although he agreed that the plaintiff was in the house a great deal, - "He almost followed me into the toilet" - he denies he ever agreed he owed anything. He agreed he used Fifita's car on many of his trips because, he said, it was almost impossible to avoid it but he denied any of the journeys were to collect money.

He said that the plaintiff did ask him and his wife for money. He said that his wife did produce \$1,300.00 and pay it to the plaintiff but he was nothing to do with the transaction and understood she had borrowed it. He denied the suggestion he had been part of the discussion.

He denied any promises of money or any of the trips to collect it that were described by the plaintiff. He stated that he helped with the final movements of the container out of compassion because he started feeling sorry for his wife.

Of the other witnesses called, I do not need to recite their evidence. It will suffice to say that I believed and accept the evidence of the witnesses from the Shipping Company and the Quarantine Department. I did not believe the witness Malia Vea and I believe the taxi driver but attach no significance to the comment he repeated that might have suggested the second defendant was claiming a joint interest in the container with the plaintiff. Such a comment is easily made and means little. The second defendant's answer to that evidence was, characteristically; "I would not discuss my business with a third party least of all a taxi driver."

It is clear that the plaintiff believed he had sold the cassava as he described. Despite the fact she pleaded that he had pressured her into buying, the first defendant did not give evidence to support this and the second defendant's evidence of his suspicion his wife was arranging something behind his back and her later comment that she would finance it herself satisfy me that she made an agreement to buy the cassava at the price stated. I do not accept she was under any pressure to make the deal. I give judgment to the plaintiff against the first defendant. I shall return later to the question of damages.

The position of the second defendant is more difficult. His part in this suggests that, if he was nothing to do with it, he was acting in a very foolish way. On the one hand he says he took the initiative very early in the proceedings to tell the manager of the shipping company not to supply a container. Yet despite

that positive step and the fact he suspected the plaintiff was putting pressure on his wife to enter a transaction of which he did not approve, he never said anything about it to the plaintiff. Further, he allowed him to be in their home a great deal without apparent demur until very much later. I have no doubt that the plaintiff was there to collect the money he was due and I cannot accept, despite his protestations to the contrary, that the second defendant was unaware of the reason why he was around so much. Yet he never discussed it with him although he was able to tell him in no uncertain terms later to get off his property.

It is almost incredible that with that degree of knowledge, that he would allow the plaintiff to drive him around in his car to the bank, as he admitted occurred once although not for the purpose the plaintiff alleged, and to the shipping office. All these he agreed should have been done differently and he could only explain his actions as a wish to avoid confrontation.

As I have said I am satisfied that both he and the plaintiff have not told the whole truth. In such circumstances, the court must bear in mind that the burden of proving the case against the second defendant rests on the plaintiff.

I have found there was an agreement to sell his cassava to the first defendant. I have no doubt the plaintiff was becoming increasingly anxious about the payment. He had already loaded the container with a large quantity of his produce. Once that was done, the shipment to New Zealand had to go ahead because, even frozen, the crop is extremely perishable. It was becoming increasingly obvious that the container was going to be sent off before his money had been paid. He could not stop the former and was impotent to achieve the latter.

Clearly the husband, with a pension available from England, was a more likely source of funds. It may be that the plaintiff genuinely assumed he would pay but he must prove the second defendant was party to the agreement. The statement of claim is that he had approached both defendants initially. It was significant that his evidence was that he was approached by the first defendant only.

I am not satisfied I have the true picture of the various trips to the bank and Cable and Wireless from either party but I do not consider the plaintiff has proved the purpose of those journeys was as he described in evidence. In the end, I am not satisfied the plaintiff has proved the second defendant was privy to this agreement. Apart from considerations of the burden of proof, two things help the second defendant.

First the pompous and dogmatic attitude the second defendant demonstrated in the witness box allows me to accept that, if he was present at any discussions, even though he was not a party to the agreement, it would be

entirely in character for him to remain even though it was none of his business. Unfortunately, that may well have led that plaintiff to conclude he was a party to the agreement especially if he took the view, expressed remarkably by his counsel, that the fact they were a married couple meant each was automatically liable for everything the other did even in business. I believe the second defendant's character could also explain his assistance on the last day described by him (and by his wife in identical words in her pleadings) as arising out of his feeling of compassion. I consider on the evidence it more likely that it arose from his attitude to his wife's lack of experience compared to his opinion of his own but I accept it explains his involvement that day and subsequently.

The second point clinches it for the second defendant. He is a retired engineer and told the court he had spent many years abroad in the tropics working to some extent on refrigeration and air conditioning. He had just frozen and dispatched a container of cassava to New Zealand which arrived in good condition. He told how he would not have dreamed of loading the quantity of cassava involved in this case in such a short time. Done that way the load would not freeze properly as happened here. That was, in his words, the Tongan way and he, on the other hand, would have done it properly. If he had been a party to this transaction, he would never have gone abroad leaving it to his wife and the plaintiff to organise the freezing. The second defendant's attitude as reflected by that unpleasant comment rang true. Distasteful though it was, it finally defeats the plaintiff's claim and I find in favour of the second defendant.

I pass now to the damages claimed. The balance of the purchase price claimed is based on 562 bags. The evidence, which has not been disputed, is that there were 574.5 bags. That would have cost \$11,490.00 less the sum of \$1,300.00 already paid leaving an unpaid balance of \$10,190.00.

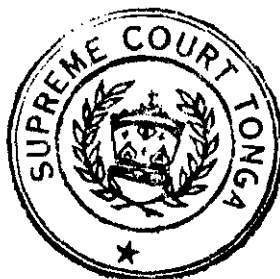
The plaintiff gave evidence that I accept that he paid \$360.00 for the electricity for the container and I equally accept that the first defendant agreed to pay that. I accept his evidence that he paid a total of \$150.00 towards the costs and he shall have that.

The claim for \$250.00 general expenses for transport of the cassava to the container and of the container to the wharf has not been sufficiently proved and I do not allow that sum.

Finally there is a claim for general damages. This was a commercial transaction. The plaintiff has proved the liability of the first defendant to complete that transaction and the award sets that right. In such a case general damages are unusual and will only be awarded where there has been evidence of some special feature beyond a mere failure to honour the

agreement. There is nothing of that sort in this case and I do not make any award under that head.

The order is that the plaintiff has judgment against the first defendant in the total sum of \$10, 700.00 and costs and I give judgment for the second defendant against the plaintiff with costs.



M. Ward

NUKU'ALOFA: 13 December 1999.

CHIEF JUSTICE