IN THE SUPREME COURT OF TONGA NO.C.986/97
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : *TOULIKI TRADING CO. LTD* - **Plaintiff;**

AND : *FRIENDLY ISLAND MARKETING CO-OPERATIVE* - **Defendant.**

BEFORE THE HON.JUSTICE FINNIGAN

Counsel appearing: Mr L Foliaki for Plaintiff,
Mr T Fakahua for Defendant.

Dates of Hearing: 1,2,3 February, 8,9,10 March 1999.
Written submissions received: 10 March, 16 March 1999.
Date of judgment: 22 April, 1999.

JUDGMENT OF FINNIGAN, J

In these proceedings, two squash exporting companies make claims against each other. The action was commenced by the plaintiff ("Touliki"), and it should be said that the defendant ("Fimco") counter-claims only because Touliki has proceeded. Fimco's position is that the issue between them was settled quickly, soon after it arose, and that by proceeding, Touliki has caused it injury, for which it seeks damages.

THE ISSUE AND THE FACTS

The issue is this. On or about 3 November 1997, officials of Touliki found some Touliki bins, filled with squash, among the Fimco squash at Queen Salote wharf, ready for export by Fimco to Japan. It is accepted that there were 21. They were the produce of a grower, Latu Silatolu Felise ("Sila"), who was registered as a grower both with Touliki and with Fimco. He had planted 16 acres, and Fimco expected to buy the produce therefrom, believing it was Sila's total production. Unknown to Fimco, Sila had another 8 acres, and had registered himself as a grower for Touliki as well. Fimco had bought those 21 bins of squash, had sold them, and was about to export them. Touliki claims that Fimco has wrongfully converted Touliki's squash and seeks compensation.

It is clear that Sila had signed grower's agreements with both Touliki and Fimco. In 1997 there were agreements between the Ministry of Labour Commerce and Industries and the individual export companies, by which the exporters agreed to bind their growers by written agreement to sell their squash only to the exporters with whom they were registered. The implicit purpose, since made explicit by Regulation I was told, was to prevent a grower doing what Sila did in this case, dealing with two exporters. In evidence Sila claimed there was no law in 1997 to prevent what he did. This was the first time he had registered with Fimco, he said, and he said that Fimco was not aware of his contract with Touliki.

The 21 bins themselves belonged to Touliki and were filled by Sila for delivery to Touliki. However, Fimco, which knew nothing of his contract with Touliki, had collected them. Fimco were expecting to take all Sila's squash and expected to find Fimco squash loaded in bins and ready for them. There is no evidence about whether or not Fimco noticed that the squash was packed in Touliki bins. Fimco had paid Sila for the squash.

Touliki immediately confronted Fimco about poaching its squash, to which Fimco replied that Sila was its grower. Fimco re-packed and exported the squash, and the Touliki bins were given back to Touliki. Touliki commenced these proceedings, claiming "US$9,900 which is the costs of squash exported". However, soon after the proceedings were served, on 22 December 1997, the parties met and agreed to settle the claim with a payment by Fimco of T$8,000.

Fimco then proceeded to payment, but discovered that it had already, on 18 November, paid Sila T$5,130 for the 21 bins. That amount was full nett payment at its ruling rate of 50 seniti per kilogram and 500 kg per bin, after deduction of an advance of $120. It therefore deducted T$5,000 from the settlement amount and sent $3000 to Touliki.

Sila, despite receiving full payment at Fimco rates pursuant to his growing agreement with them, has complained to Fimco from the beginning about this and other matters. He says the 21 bins of squash were intended for Touliki. He has however, retained Fimco's $5,130.

TOULIKI'S CLAIM

Touliki's claim is, as above, for US$9,000. Fimco's defence in its pleadings is that it owned the squash, having bought it in the normal course of business, and is not liable to Touliki. It stands by its $3,000 payment to Touliki, saying it is sufficient compensation for whatever injury Touliki may have suffered. That sum, it says, is all pure profit to Touliki, for which Touliki has advanced no funds, done no work, and incurred no expenses. Fimco showed by evidence that it received on sale of these 21 bins T$1.135 per kg. It calculates its production costs at T$0.94 (94 seniti), and its profit at T$0.195 (19.5 seniti) per kilogram. Its gross profit, at 19.50 seniti for 21 bins each containing 500 kgs it calculates at (19.50 x 500 x 21), i.e. T$2,047.50, and it has paid this sum plus about 50% more to Touliki.

Fimco is not strictly correct in asserting that Touliki incurred no expenses in respect of these 21 bins of squash. Sila had been a regular grower with Touliki since 1991, and in the 1997 season it advanced him both seeds and fertiliser on credit, to a total of T$5,474.22, for payment out of the proceeds of his sales to Touliki. As it happened however, these advances were all cleared from the proceeds of his other 1997 sales to them [Exh P8]. Fimco therefore is correct in the end. All that Touliki lost with these 21 bins was the profit from on-selling them.

TOULIKI'S CAUSE OF ACTION

Touliki does not sue on the contract of settlement. It advances the claim which was purportedly settled, in wrongful conversion at common law or alternatively for tortious interference with goods under the Torts (Interference with Goods) Act (UK) 1977. In final submissions , Mr Foliaki relied only on the statutory claim, but did not refer to any provisions in the statute. He relied heavily on the evidence of the grower, and so I pause first to refer to that.

Sila's evidence was that he had been growing for Touliki since 1991, but in 1997 he grew for Fimco as well in order to obtain TDB finance for part of his crop. He had 24 acres to plant. He said in evidence 6 would be for Fimco and 18 for Touliki. He had one plot of 16 acres (2 tax allotments), and another 8 acres somewhere else. He said it was the Fimco part of his crop which was to repay the TDB loan, as well as the costs of seed and fertiliser advanced on credit by Fimco. When he began to harvest, he decided to send the first produce to Fimco, so that the proceeds would repay his TDB loan. Some of the bins he prepared were collected by Fimco, but some were left. He was dissatisfied, and as a result he sent some of that squash to Touliki. He later packed the 21 bins concerned in this case and left them for Touliki to collect. Unknown to him they were collected by Fimco, whom he had repeatedly asked to return and collect what they had previously left.

I have had full and detailed submissions from Mr Foliaki and have taken them into account , along with Mr Fakahua's submissions in reply, when reaching my conclusions. Mr Foliaki relied not upon decided cases but upon the definition of conversion in *Street on Torts*, 4th ed at p 25. That is an acceptable definition, stating conversion to be the intentional dealing (innocent or not) with a chattel that is seriously inconsistent with the possession or right to immediate possession of another person.

DECISION OF THE CLAIM

In Mr Foliaki's submission, the person entitled to immediate possession of the 21 bins was Touliki, and Fimco wrongly took them, intending to exercise dominion over them. In Mr Foliaki's submission the evidence of Sila establishes clearly that they belonged to Touliki, because they were his to dispose of, and what he did with them was his business as long as he fulfilled his agreement with Fimco. He submits that Sila honoured his agreement with Fimco and that that agreement had been frustrated by the failure of Fimco to collect all that had been packed for them. Thus, he argued, Sila was free to sell the

squash in these 21 bins to Touliki. It is not clear to me that this is so, but in any event Sila did not sell them to Touliki. They had not been inspected, graded, accepted or rejected by Touliki. They were simply harvested squash, ready for Touliki to take. They belonged to Sila, and Sila demonstrated in evidence that he was capable of changing his mind. He had earlier packed squash for Fimco, kept them ready for Fimco to take, and had repacked them before collection and sent them to Touliki.

Was Touliki entitled to immediate possession of them? If Sila's intention is the test, his intention was that Touliki should have them, they were packed in Touliki's bins. If contractual entitlement is the test, as also submitted by Mr Foliaki, it is not clear. It is wrong to suggest that it was Sila's business what he did with his squash. He was governed by his grower's contracts, and had no choices outside those contracts. There was evidence that Sila had bought seeds and fertiliser from both exporters, and had agreed to sell exclusively to each exporter the produce from the seeds and the fertiliser supplied by each. It seems clear that Sila was not capable of abiding by those agreements, i.e. that he had not kept the two plots separate. In any event, his evidence is that he sold to Fimco, not the squash from Fimco's seeds, but his first harvest. He then packed for Touliki, not on the basis of any contract, but on the basis of disappointment with Fimco. Both exporters claimed some contractual entitlement to these particular squash, and the claim of neither, on the evidence before me, can be denied.

It s clear to me that conversion may occur, with consequent liability, in circumstances such as those of this case, even when the interference with property is innocent. I am aware of such cases as *Wilson v New Brighton Panelbeaters Ltd*[1989] 1 NZLR 75 in which this tort is discussed and analysed. I adopt the conclusion of Tipping J in that case that the essence of conversion is a denial without lawful justification of a plaintiff's rights to his goods by asserting a temporary or permanent dominion over them in a manner inconsistent with the plaintiff's rights thereto.

Some of the elements of conversion are present in the present case, but in my opinion the plaintiff has not been able to establish that it had rights to immediate possession of the squash in question. It seems to me also that it has not established that Fimco acted without lawful justification, because Fimco may well have had some right to the squash in dispute.

On the claim the plaintiff fails, judgment must be given for Fimco.

For certainty about my findings on the claim, I proceed to the quantum of damages. I accept the principle relied on by Mr Foliaki that a party deprived of his chattel by unlawful conversion is entitled to the full value of that chattel in damages. The question is, what is the full value of the 21 bins of squash to the plaintiff? In his final submissions Mr Foliaki reduced the claim from US$9,900 to T$3,667.50. He accepted the price obtained by the defendant on sale (T$11,917.50), and deducted the T$3,000 already paid to the plaintiff and the purchase price paid to Sila, T$5,250. The balance is T$3,667 50.

Thereafter he added the sum of T$4,500, said by the plaintiff to have been advanced to Sila, bringing the total claim to T$8,167.50. I pause to make two comments about that. First, the claim now advanced for T$4,500 is not supported in the evidence. In its summary of seeds and fertiliser transactions with Sila in 1997 [Exh P8], which did not include this amount, the plaintiff stated that the total of what had been advanced to him had been fully cleared from his 1997 squash proceeds. This sum was said during the hearing to have been advanced as two separate sums on 31 October 1997. By that time the harvesting was well under way. When confronted with this claim during the hearing Sila expressed surprise, but said that if he owed it he would pay it. It is a matter that needs to be proved and resolved between Touliki and Sila. It is certainly not a debt for Fimco to pay.

That being so, T$3,667.50 is the amount that the plaintiff now claims is the full value to it of the 21 bins of squash. That cannot be so, because (1) the $3,000 already paid had nothing to do with calculation of the value and (2) the plaintiff has not deducted its full production costs, only the cost of purchase from Sila. The full value of the squash to the plaintiff is what it put in the bank after all was done and paid for. Using the production costs in the evidence, those of the defendant, they were in total 94 seniti per kilogram. The T$5,250 paid to Sila was 50 seniti per kilogram, leaving a balance of 44 seniti per kilogram still to be deducted. There were 10,500 kilograms in the 21 bins, so there is still (10,500 x .44) i.e. T$4620 to be deducted. Incorporating that into Mr Foliaki's calculations, it produces a value of [T$11,917.50 – (T$5,250 + T$4,620)], i.e. T$2,047.50. The plaintiff has already been paid T$3,000. There is nothing left to claim.

THE COUNTERCLAIM - FIMCO'S CAUSE OF ACTION

As mentioned above, from this harvest Sila did sell a quantity of squash to Touliki. Fimco's claim is for T$10,000. It claims this first "for profit lost from the 52 bins the plaintiff bought from [Sila]", on the ground that the contract between Touliki and Sila was illegal or contrary to public policy. This is said to be because it is claimed (a) that there was a conspiracy between them to obtain 6 kg of seed and fertiliser through the Tonga Development Bank [TDB], and loan money, and (b) that those two parties intended directly to evade or frustrate the requirements of Fimco, and to defraud Fimco.

I shall deal with this claim immediately. I have considered and taken into account the submissions of Mr Fakahua and those in reply of Mr Foliaki. Mr Fakahua has submitted that these two parties knew their contract was illegal or contrary to public policy because everybody knew that registering with two exporters was prohibited. That claim was not established. This first claim cannot succeed because there simply is no evidence of conspiracy between Sila and Touliki. Neither is there evidence about their contract that enables me to conclude that they intended to evade or frustrate the requirements of Fimco as pleaded, or to defraud Fimco.

Fimco's second (and third) cause of action is also in defamation. It is that Touliki has failed to abide by the agreed terms of their settlement agreement. It claims that the payment of T$3,000 should have been the end of the matter, and that in pursuing the

matter to court the plaintiff has spoiled its reputation as a reliable, respectable and responsible company.

In Mr Fakahua's submission, Touliki gave a receipt for the T$3,000 without claiming that it was part-payment only. He submits that this can only mean that Touliki has proceeded to make its claim in court after agreeing to settle the case and after accepting $3,000 in settlement. To accept T$3,000 in settlement was the only reasonable course after the agreement in his submission. In proceeding with its original action, he submits Touliki has spoiled Fimco's reputation and should pay damages. In reply, Mr Foliaki submits that the agreement should be interpreted as requiring T$8,000 without deduction and that Touliki was entitled to expect that sum because there were no other terms.

Fimco's fourth cause of action is also in defamation. It is that the failure of Touliki to ascertain who are its growers was unlawful, arbitrary and oppressive, and has caused Fimco financial loss. In his submissions Mr Fakahua relied on the evidence. He called two witnesses who made claims of loss of faith in Fimco. There was no evidence of any quantified loss.

DECISION OF THE COUNTERCLAIM

In the second and third causes of action the defendant relies on the settlement contract, which requires the Court to interpret the contract. The plaintiff in its claim did not rely this contract, but the defendant does. Both made submissions on its interpretation. In my opinion the only clear and unmistakable meaning of the agreement for T$8,000 was that this was the total to be paid, as if the grower had not yet been paid. I am satisfied by the evidence of Ma' u Havea that in agreeeing to pay T$8,000 he intended the cost of purchase from the grower to be included in the settlement. From his evidence I am satisfied that he was unaware when negotiating that his company had already paid, and that he was informed of this only when he gave instructions for the T$8,000 payment. That fact was clearly outside the knowledge of the other negotiator Mr Sevele, and the topic had not been raised. I am satisfied that Mr Havea phoned Mr Sevele to say he was deducting theT$5,250 already paid, but was unable to contact him before sending the cheque. The payment was prompt, as agreed. To settle on T$8,000 plus a further payment by the payer to the grower for the squash would have been a handsome settlement for the plaintiff indeed, and greater than any losses the plaintiff proved at the trial. I find that the payment made by Fimco settled the matter, in accordance with the settlement agreement.

I find it also settled claim for value lost, by paying a greater sum. Thus, I find the defendant is correct, these proceedings had been settled, and were brought to recover something that could no longer be recovered.

However, as for defamation and/or loss of reputation and/or loss of profits, the defendant in my view has not established by evidence that its expressed concern is warranted. In other words, the witnesses did not persuade me that the reputation of Fimco had been damaged by this court case.

In the outcome, the defendant has successfully defended the claim, but has not established its counterclaim.

COSTS

On the claim, costs are awarded to the successful defendant, to be agreed or taxed. The counterclaim was a product of the claim. On the counterclaim I make no order for costs.

NUKU' ALOFA, 22 April 1999

SUPREME COURT TONGA

JUDGE