IN THE SUPREME COURT OF TONGA **C.611/97**

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : SAIMONE KENITOLO MOLITIKA : ***Plaintiff***

AND : TANIELA VAITOHI : ***Defendant***

BEFORE HON JUSTICE FINNIGAN

Counsel : Mr L Foliaki for Plaintiff, Mr P Tonga for Defendant

Dates of hearing : 22, 23, 24 March, 18 June 1999
Date of judgment: 9 August 1999

JUDGMENT OF FINNIGAN, J

This is a claim for moneys said to be unpaid pursuant to a series of agreements. In an amended statement of claim, the plaintiff claims $12,000 said to be due under an initial agreement for a lease of part of his land. He claims also $20,000 plus $10,500 as unpaid rental for accommodation, both said to be due under a second agreement.

THE PLEADINGS

The plaintiff pleads that he is the registered holder of a town allotment, which has been leased to the defendant in two separate agreements. The first agreement, which was oral, is said to have been made in November 1993. This is said to have been for part of the allotment, for 15 years at $100 per year and a $20,000 lump sum. The $20,000 is said to be still unpaid, although this claim is countered later in the pleadings, and reduced to $12,000. The plaintiff pleads that after the Cabinet approved that lease the parties made a second agreement for the rest of the allotment. The price for this second lease is said to have been $20,000 plus provision by the defendant of a home for the plaintiff and his family, in which they were to live until the lease expired. It is said that neither this $20,000 nor the promised home have been given.

It is said that the leases, when approved by the Cabinet, were not for 15 but for 50 years, but no claim of wrong is made and no remedy is claimed for that.

The plaintiff then pleads that, as part payment of the first lease, the defendant supplied a truck with an agreed value of $12,000, but the truck broke down and was returned. It is said to have been replaced with a truck valued at about $8,000. With that there is said to have been a promise, still unfulfilled, that the first truck would be sold and the money from the sale given to the plaintiff.

It is pleaded that on 2 September 1994 the defendant was granted in court a writ of possession of the leased property, because the plaintiff had not vacated the residence. The refusal to vacate is said to have been because the defendant failed to build the promised house. The defendant is said to have then arranged a rental house at his own expense and paid the rent of $250 for the first month. No contract is alleged. The plaintiff it seems relies on his claim of an agreement for accommodation. The plaintiff is said to have provided no accommodation after the first month and to have made no further payments. The $10,500 claim is for $250 rental for 42 months.

THE AMENDED STATEMENT OF CLAIM

I have read and considered the submissions of both counsel about this. Suffice to say that I am satisfied that there is no prejudice to the defendant, and that the amendment should be made. If the original pleadings remain, they will omit some essential facts of which evidence was given both in chief and in cross-examination during the hearing. Also the original pleadings will restrict the plaintiff to judgment for only $12,000 for alleged breach of the first lease agreement and $10,500 for alleged breach of the accommodation agreement. Clearly on the evidence of both parties the claims should be for more.

I am bound to say that there are still irreconcilable mis-matches between what the plaintiff pleaded and what he alleged and/or acknowledged in evidence. There is still no basis for the submission of his counsel that the claim is for $50,000.

THE MAIN FACTS

In coming to my conclusions of fact I have considered the evidence and I have taken account of the written submissions of counsel for both parties. I compliment counsel for both parties for the clarity and brevity and the detail of their submissions. The strange course of the parties' dealings and a certain amount of muddlement have made this case difficult. There was not only the need to seek amendment of the statement of claim to reflect the difference between counsel's understanding of the plaintiff's instructions and the plaintiff's evidence. Even now, there is no pleaded claim in respect of the $10,000 agreement for sale and purchase of two houses on the allotment. In his evidence the plaintiff at first when shown this said that he knew nothing of it, but twice he acknowledged that he had signed it. The defendant in evidence produced it and acknowledged it. Both parties signed it (doc D5A). The submissions of counsel for the plaintiff have proceeded as on a claim for $50,000 including it. But it was not pleaded.

From the evidence it is clear that there are two $20,000 agreements, from which a total of $32,000 is claimed, and there is another claim for $10,500. The defendant acknowledges both in evidence and in submissions that there are three agreements for him to pay $50,000 for the land and houses. He denies any agreement for him to supply accommodation or pay rent for the plaintiff. The defendant replies to the claims (a) that he has already paid $48,385.10, and (b) that he is not liable for any rental payments

The case therefore is first about payment. I am required to decide whether the defendant has paid the plaintiff, and if so how much. Second, I am required to decide whether there was an agreement for the supply of accommodation and/or for payment of the plaintiff's rent, and in particular whether there is liability for 42 months' rent payments at $250 as claimed.

Five witnesses gave evidence for the plaintiff. These were the plaintiff himself, his father-in-law, his wife, his mother and his father. Each was involved in the events to a greater or lesser degree, but only the plaintiff was involved in the actual agreements to lease. His mother was present for some of the discussions, but he alone negotiated and settled the terms. He told his wife and parents later what he had done. His father-in-law went with him when he finally agreed with the defendant at the latter's office, but took no part in negotiations. The father-in –law said the first agreement was in February 1994, not November 1993.

So far as I can calculate from his evidence about his age, the plaintiff at that time was 16 years old, turning 17 in June 1994. His father told the Court that he had transferred the ownership of the land to the plaintiff, his eldest son, and had thought that his son would look after him later. Instead he had heard the land had been leased out, and asked his son, who confirmed it. His evidence was that he regarded the plaintiff as disobedient to his father and to his mother in doing what he did. I find that, having little choice in the matter, he accepted the situation, and he saw an opportunity of recovering something for himself and the plaintiff's mother.

For the defendant there were three witnesses, the defendant himself and two employees who were involved.

The evidence of the plaintiff did not entirely match his pleaded claims, even as pleaded in the amended statement of claim filed after the plaintiff's evidence concluded. As well, some parts of his evidence were unreliable. For example, his initial strong denial of his signature on a vital document, (doc D1A), was later changed to acknowledgment. Another agreement, (doc D5A, the agreement encompassing both lease agreements and an agreement for sale and purchase of two houses on the allotment for a total price of $50,000), he did not mention at all in his pleadings or in his evidence until cross-examined. When shown the document, he said (i) that he recalled it and acknowledged his signature, (ii) that he did not know the document, and (iii) that it had been prepared by the defendant and that he had signed it. His recollections and his evidence appeared to me sometimes to be deficient on material facts.

There was some conflict between the witnesses for the one party and those for the other. However, from the evidence of all 8 witnesses, and from the documents that were produced, it is not difficult to reach clear findings on the balance of probabilities. What follows are my findings of the facts of the matter.

It seems (from document D2A) that the plaintiff became the registered proprietor of the land on 11 February 1994, when he was 16. By 14 April the first agreement to lease part of it to the defendant was already complete because on that day the plaintiff acknowledged in writing (doc D182), that he had leased part of his allotment to the defendant. I find that the agreement had been reached actually on 31 March 1994, the date on which the plaintiff and his father-in-law took possession of a Toyota Dyna vehicle (below). On 20 April the Cabinet approved the first lease, for 50 years at $2 per year. On 3 May the parties applied to the Minister for correction of the area and amendment of the term to 99 years (doc D1A).

On 8 June 1994 the parties signed a written agreement, confirming the lease of the whole town allotment for 99 years, in return for a payment by the defendant of $40,000 and annual rent of $2 (doc D2A). The Cabinet approved the second lease, of the remainder of the allotment, on 14 June.

On 14 July 1994 the parties signed another written agreement (doc D5A). In this document the plaintiff sold and the defendant bought the two dwelling houses on the allotment for $10,000. The agreement confirmed that the total now owed by the defendant to the plaintiff was $50,000.

There was nothing recorded about how or when the $50,000 was to be paid. The plaintiff never demanded payment of any of the lump sums, or of the annual rentals. No time limit was set for payment. From the evidence of the plaintiff, his father-in-law and the defendant, there is no question that the initial transaction came about because the plaintiff and his father-in-law were anxious to get possession of a motor vehicle. The defendant is a dealer in vehicles. On the day that they first reached agreement, 31 March 1994, and before any documents were prepared, the plaintiff and his father-in-law selected and drove off in a Toyota Dyna vehicle. The plaintiff signed a receipt for it that day (doc D1), at a value of $12,000.

Within a short time, and well within 6 months, that vehicle was returned to the defendant. The plaintiff and his father-in-law said in evidence it had broken down, the defendant said it had been damaged and reduced in value. A 1-ton truck was given in its place, at an agreed value of $8,000. The plaintiff claimed that it was to be replaced by another 2-ton truck from a later shipment by the defendant but never was. The defendant says the original vehicle had been reduced in value to $8000 and was traded with the plaintiff for a smaller one in better condition at that reduced value. Neither party made any record to clarify their intentions.

From 31 March 1994 on, the plaintiff approached the defendant whenever he was in need of sums of money, or vehicle parts and services, and what was asked was supplied. The defendant's employees recorded each advance in one receipt book and then a second. The plaintiff signed most of the receipts for advances made to him. There were 181 receipts produced in evidence. The fact of the matter is that the defendant was paying the plaintiff the $50,000 in a drip-feed process, as and when demanded by the plaintiff. At no time did the plaintiff ever ask the defendant to advance any substantial sum in cash, or set a time limit for payment of the purchase price.

Some of the receipts were for advances to his parents. The father in evidence acknowledged many of the advances and identified his own signature.

The 181 receipts produced in evidence were photocopies of the receipt book carbon copies. I was told the actual books were produced in the defendant's proceedings for possession. The originals of the individual receipts, which reasonably might be expected to be in the possession of the plaintiff and/or his father, were not produced. It is unclear to me whether they were given to the plaintiff. The plaintiff did not mention them in evidence, but his father was asked about them. He said he asked the defendant for the receipts he signed because he wanted a copy of what he had signed, and he wanted a record of what he had taken, but the defendant had said to leave them with him, he was keeping a record of what was being given.

The receipts record that it was not only cash that was advanced, and not only to the plaintiff.

First, there was the 1-ton truck. From the evidence of the father-in-law, I find that the initial 2-ton truck was immediately registered in that man's name, as was the substitute 1-ton truck. The latter is still in the father-in-law's possession.

There was a pig, asked for by the plaintiff and valued by the parties at $500. There were debts owed by the plaintiff, which the defendant paid at his request (e.g. doc D138, unsigned, but accepted by the plaintiff in evidence as authorised). For some debts there was specific authority, and an example of those is document D182, signed on 14 April 1994. Another payment was an amount that the defendant said the Court had ordered the plaintiff to pay after the judgment in the action for possession of the land (doc D127). This costs payment he said he did not authorise, but he had signed the receipt and in submissions counsel accepted the payment. For his part in evidence, the plaintiff acknowledged that an order had been made at about the amount recorded in the receipt.

There was a Toyota Corona sedan, valued at $7,800 (doc D100), which the plaintiff acknowledged during the hearing as part of the purchase price of the lease. The plaintiff said it broke down after about a month and he returned it to the defendant. He said he got tired of waiting for the defendant to repair it and it was never returned to him. From the registration certificate, which was produced by plaintiff's counsel during cross-examination of the defendant, it seems this vehicle is still registered in the name of the plaintiff's wife. He said he was given a replacement car, and that car also broke down after he had used it for a year. He said he returned that car also to the defendant. The defendant agreed that the Toyota car had been brought for repairs, but claimed that the plaintiff had sold it to him in 1996. He said he was able to show a record of a purchase price paid to the plaintiff but none was produced. He claimed it was badly damaged on its return, but was unable to give any estimate of its value, or of what he paid the plaintiff. Later in evidence he said that the repair had been a pressure plate, that this had been done and the vehicle returned to the plaintiff, in September 1994. He acknowledged there is no record of any charges for repairs done on the Toyota car in the charges he credited towards the purchase price of the allotment. He gave no evidence about the plaintiff's claim of a replacement vehicle, used for a year then returned for repairs.

There was a Honda car, valued by the defendant at $6,000. The plaintiff's father took this. There were vehicle parts and vehicle repairs, some for the plaintiff, some for his father (e.g. docs D109, D123 and D159). There were sums advanced in cash to each of the plaintiff's parents, to pay electricity and water accounts, and otherwise as requested by them (e.g. docs D128 and D129).

The $6,000 Honda car was taken by the father without the plaintiff's knowledge, and registered in his name. The receipt for this vehicle (doc D44) was not signed, but there can be no doubt that the vehicle was taken. I accept the father's evidence about it, even though he denied asking specifically for that particular car. He said he asked for a car so he could take his wife to her medical treatment. He said he used it then it broke down and he talked to the defendant, who brought it to his workshop. Eventually he sold it to the defendant's staff for the price they suggested, $300, and he kept the money. He said they came to him and said it had no tyres and most parts of the engine were missing, and asked his price to sell it to them. He did not know a price so accepted their offer of $300.

The plaintiff said in his evidence that he noticed from the receipt book that the defendant was supplying cash and paying bills for his father, and that he thereupon directed the defendant to stop supplying his father, but his father and the defendant denied that. From the evidence of the plaintiff's father I find that his father saw the payments as a way of receiving from his son some compensation for what he had lost when the land was leased.

Much was made at the hearing of the condition and history of the various vehicles once the plaintiff and his family took possession of them. He and his father and his father-in-law all said the vehicles which they took developed serious faults, and they returned them to the defendant, expecting him to take action to repair or replace them at his expense. There was a great deal of questioning over this, but not much hard information was brought out in the answers.

I do not see much to question. All this is governed by the agreements between the plaintiff and the defendant. The agreements required the defendant to pay the plaintiff $50,000 in cash or kind as and when required by the plaintiff, and subsequently by his parents, with no limit on amounts or time. In other words, the defendant was to supply cash or its equivalent in services. He supplied a 2-ton vehicle at $12,000. He subsequently accepted that back in reduced condition and replaced it with a 1-ton vehicle at $8,000. The balance he owed the plaintiff at that point was still reduced, according to my findings above, by $12,000 and not by only $8,000. The plaintiff has no right to the return of the first vehicle, or to the proceeds of its sale. On the evidence, there was never agreement for, and therefore never a right to, free servicing of that or any of the vehicles.

DELIBERATION – THE SUBMISSIONS

There has been no suggestion by counsel that these contracts are in any way affected by any law governing the contractual capacity of minors, or by the Contract Act cap 26 (now repealed).

To determine how much the defendant has paid, the evidence is the receipts. In the written submissions of his counsel the plaintiff now resiles from the position he stated during his evidence, that what the defendant gave him and his family, and recorded in the receipts, were gifts given out of love. He acknowledges that his former position was naïve. He challenges only four aspects of the receipts. First, he submits that the defendant should have credit for the first truck not the $12,000 claimed by the defendant and recorded in doc D1 as the value of the 2 ton vehicle taken and returned, but only $8,000 as the agreed value of the 1 ton truck later substituted. He submits that the defendant's position is not reasonable, particularly his claim that the first vehicle had sustained $4,000 damage. In reply, counsel for the defendant made only a brief submission about the lack of evidence of the costs of repairs.

In the view that I have formed, it was not reasonable in the circumstances for the plaintiff to expect free repairs. In my opinion the plaintiff and his father-in-law decided not to pursue the repairs to the first truck and accepted the second truck as a replacement, thus avoiding the need to pay for the repairs. By accepting the replacement they settled the matter. Any variation in value was not recorded. The defendant for his part had given $8,000 value and still had the expense of repairing the first truck before selling it with one additional registered previous owner. The plaintiff must be taken to have accepted that the cost of repairs and re-sale to the defendant would have been, for the purposes of the transaction, $4,000. From the evidence I have no doubt that is correct, and I must reject that submission. The amount of the defendant's payment via these vehicles I fix at $12,000.

Second, counsel submits that the Honda car valued at $6,000 and recorded in doc D44 should be disallowed as a credit against the defendant's debt to the plaintiff. In reply, counsel for the defendant again made only brief submissions, about the probative value of the conflicting accounts. The plaintiff's father arranged this vehicle in June 1994 without the knowledge of the plaintiff, and neither he nor the plaintiff signed the receipt for it. The defendant gave evidence that he had been told to let the parents have whatever they asked for. He said the agreement to allow this car to be taken and added towards payment for the leases was the previous transaction when a truck had been given to the father-in-law. Counsel submits that I should reject the defendant's evidence of an instruction from the plaintiff to allow his parents anything they wanted. I have considered the evidence of all three witnesses who were questioned about this, (the plaintiff, the defendant and the defendant's employee 'Ailini) and I cannot be satisfied on balance by the evidence that the plaintiff did give the defendant that instruction.

I have considered the position about this car at length. It seems inequitable that the vehicle appears to have been stripped while it was in the defendant's workshop for repairs. More so that it came into the possession of the defendant's employees at a nominal price for that reason. However, I put that factor aside as irrelevant in the present claim.

The essential point is that the defendant has raised a positive defence. His claim is that he has already paid what the plaintiff is claiming from him. He has undertaken the burden of proving it as a positive defence on the balance of probabilities. It is for him to prove what he claims. His evidence is that he gave the car to the plaintiff's father because the plaintiff said to give whatever the father asked and credit the amount towards the payment for the allotment. The plaintiff and his father both said they did not live together. The father said he was not aware whether that had been said, and that the plaintiff had not told him. That was not why he went to get a car from the defendant. He said he went to the defendant for a car to use to take his wife to medical treatment, and the defendant chose and gave him a black car. The father said that when the plaintiff asked him where he had got the car, he told the plaintiff the defendant had given it to him and his wife to use and the plaintiff asked why. The father told him he had asked and the defendant had given it.

The vehicle clearly became the property of the plaintiff's father, and from his evidence it is clear that he placed no great value on it.

However, the evidence falls short of establishing the defendant's claim that he had an arrangement with the plaintiff. Both the defendant and his employee 'Ailini gave evidence that before the Honda car was given the plaintiff had told the defendant to let his parents have whatever they wanted. They were no more specific than that. For his part, the plaintiff was specific, and his evidence was not denied. In respect of doc D43, the receipt immediately preceding the receipt for the Honda car, the plaintiff gave evidence on two separate occasions, in evidence-in-chief and in cross-examination. Both times he said that he came and found the receipt in the book, showing that somebody had given money to his father. Both times he said that he signed that receipt, and took responsibility for accepting that payment, and claimed he then said to the defendant's employees that no more money was to be given to his father. In the face of the plaintiff's denial, the defendant's claim for such a large sum, given to somebody other than the plaintiff, needs something more than the mere assertion of the defendant. He could easily have confirmed the arrangement, if it existed, by having the plaintiff sign on one of his many visits. For the initial 2-ton truck, given to the father-in-law, the defendant had the plaintiff sign. In my view, the absence of a signature on the receipt for the Honda car is fatal to the defendant's claim.

For those reasons, I must on balance accept counsel's second submission. The $6,000 cannot be added to the defendant's payments.

Third, counsel submitted that the Toyota Corona sedan valued at $7,800 (doc D100) should not be credited to the defendant's payments. Again, in reply counsel for the defendant made a submission only about the conflict in the evidence. Both parties agree, the car was returned to the defendant. There is no conclusive evidence to show what happened to it after that. The defendant seemed to me from his answers to have no clear idea of what had happened to it. Both parties agreed that it was no longer with the plaintiff. The defendant made no comment about the plaintiff's claim that he had a substitute car for a year. Counsel has pointed out that there is no record of repairs to the car as alleged by the defendant, and that neither is there any record to support the defendant's claim that he bought it from the plaintiff. Neither, he submits, is there any evidence to support the defendant's claim that he sold it again, since there is no evidence of that and the registration certificate still shows the plaintiff's wife as registered owner. The only safe course on the evidence is to hold that it was returned to the defendant, without any payment or vehicle given by him in its place. I conclude that he can not credit it as a payment to the plaintiff.

Counsel's third submission must therefore be upheld. The $7,800 represented by doc D100 cannot be credited to the defendant's payments.

The fourth and final submission of counsel for the plaintiff groups the remaining receipts into categories. First he has prepared a schedule of receipts accepted by the plaintiff. These total by his calculation $17,295.29. Counsel for the defendant Counsel for the defendant made detailed submissions in rebuttal. He has not challenged the calculation. That sum may be added to the sums credited to the defendant, and I hold accordingly. Second, he has prepared two schedules of receipts that are not accepted by the plaintiff. These are (a) unsigned receipts and (b) receipts issued to the plaintiff's father.

About (a) the unsigned receipts he submits that the defendant and his witnesses were unable to give direct evidence of any particular advance against any unsigned receipt, claiming in evidence that the plaintiff was often in a hurry and left without signing. They said they intended to have him sign next time, but there was no evidence that this ever occurred. The fact that they did not get his signature, if that happened, has in his submission caused the very situation that now exists, with the plaintiff denying receipt and the defendant offering no more proof of his claims than allegations of a course of conduct, without details.

I have considered the submissions carefully. I accept the submissions of counsel for the plaintiff. In the situation created by the pleadings, it is the defendant who has undertaken the burden of proving on the balance of probabilities a positive defence. It is for him to prove what he claims. It was he who, throughout the course of dealings was preparing agreements for signature. It was he who kept a record in a receipt book of what he now claims he was giving to the plaintiff and made provision for the plaintiff to sign the receipts. In other words, he was creating the evidence upon which he would later rely. Where the evidence falls short of establishing his claim then it is his own deficiency that has caused that shortfall and the consequences should fall on him. In my view, where there is no signature on any of the receipts which he has prepared, the receipt is only an unproved allegation. I accept counsel's unchallenged calculation of the total of those receipts as $2,170.86. The sums in those receipts can not be credited to the defendant's payments, and I hold accordingly.

I turn now to (b) the schedule of receipts issued to the plaintiff's father. This schedule includes some that were unsigned and denied by the father in evidence, but counsel has kept them all together under the one head. I assume they include the sums that the mother said in evidence she had taken. There was no agreement among the witnesses about the authority for advances to the plaintiff's parents. The parents in evidence said that it was not their son who had invited them to ask the defendant for whatever they wanted. They said they were invited by the defendant, and thought he did that out of love for them. The father said he thought the defendant did that because he felt sorry for their loss of the use of the allotment. The defendant for his part said he was authorised by the plaintiff. The plaintiff for his part said he noticed the advances in the receipt book and directed that they stop.

I have considered the arguments of both counsel about these receipts, and I have formed a clear view. I accept the unchallenged calculation of counsel for the plaintiff, and fix the total of these payments at $3,595.95. Apart from that the evidence itself is inconclusive. The deciding factor, again, is the defendant's discharge of the onus on him to establish his positive defence. It was for him to keep a record that established his claim. He owed a debt to the plaintiff. For discharge of that debt, receipts signed by the plaintiff are the best evidence. Receipts signed by the father must be supported by some evidence that the receipt of the father was authorised by the plaintiff as a sufficient discharge for the defendant. Otherwise those receipts can not be acceptable for discharge of the debt to the plaintiff. Much more so when the receipts for supply to the parent were not signed at all. The other witnesses contradict the evidence of the defendant and his employee that he was authorised to supply cash and services to the plaintiff's parents as payments of his debt. His evidence by itself is not sufficient to establish on the balance of probabilities that the plaintiff had authorised it. I therefore conclude that the cash and services supplied to the plaintiff's parents cannot be added to the payments made by the defendant in reduction of his debt.

Thus, the total proved as paid in reduction of the defendant's debt is ($12,000 + $17,295.29) $29,295.29.

THE ACCOMMODATION CLAIM

Both counsel made clear submissions on the evidence about this claim. I prefer and adopt those of counsel for the defendant. On the evidence put before me there were two agreements made between the parties and put in writing. These are documents D2A and D5A, referred to above. They show written agreement for lease of the whole allotment and the two houses on it for a lump sum payment of $50,000. The plaintiff did not mention one of these in his claim or in his evidence until cross-examined about it. That is the agreement in document D5A for purchase of the houses and a total liability of $50,000. He now claims under it in his counsel's submissions. He does however claim something which is not recorded and which the defendant denies, an oral agreement made at the same time as one of the written ones. I am unable on the evidence to accept that there was such an agreement. I think it is likely that the topic of accommodation for the plaintiff and for his wife(who gave evidence that she was living in one of the houses) was discussed. But there is no evidence of any contract formed between the parties that, as part of the agreement for sale of the lease and houses, the defendant bound himself to provide accommodation for the plaintiff.

Not only that is against the plaintiff. His claim is that the defendant bound himself to provide accommodation for the term of the lease. When he pleaded that claim, his claim about the term of the lease was that there was agreement for a 15-year term, but that the Cabinet approved a 50-year term. The evidence (doc D1A) shows that he signed an application for the Cabinet to vary the first registered term from 50 to 99 years. It cannot be that the defendant bound himself to provide accommodation for 99 years. About this claim, the plaintiff's evidence is not convincing at all.

The evidence for the claim for rent payments for 42 months is even weaker. There clearly was an arrangement made about rental accommodation, the defendant admits that. But it was not part of the agreement for lease of the allotment and sale of the houses. It came about after the plaintiff refused to vacate the allotment, and I accept the evidence of both parties that the defendant offered to find rental accommodation and did so. There is no evidence of the terms of that offer except the conflicting claims of the parties. The plaintiff said it was an offer to provide the house and pay for it, followed by a suggestion after about 6 weeks that the plaintiff take other accommodation with the defendant paying the rent money, $250 per month, direct to him. The defendant said it was an offer to locate a house for the plaintiff to rent at his own expense. Either way, there is no basis of contract established. There is no evidence of consideration for acceptance of the offer. To the contrary, there was no foundation in the facts for a contract. The defendant had the authority of a court order to demand that the plaintiff vacate the property. He had no need to bargain, and there is no persuasive evidence that he did. There is evidence from the plaintiff's parents that he showed some sympathy for them. There is also evidence that the defendant did pay some monthly rental payments. Documents D130 and D157 show payments made on 16 September and 18 (or 28) October 1994 which the defendant claimed as credits towards his debt. Therefore I conclude without difficulty that there was a house provided by the defendant for the plaintiff, but I can find in the evidence no foundation for a claim that he was bound by contract to do that. Nor can I find any evidence for the claim that he had bound himself to pay the rent for any period. There is certainly in the evidence no warrant for a finding that he bound himself to do so for the term of the lease.

Therefore, for these reasons, the claims of the plaintiff for monthly rental payments cannot on the evidence succeed.

CONCLUSION AND FINDINGS

For the reasons I have stated, the plaintiff succeeds in some of his claims but not in all. He has proved, and the defendant has throughout admitted, that the defendant is liable to him for $50,000 in respect the lease of the allotment and the sale of its houses. The defendant for his part has established that he has paid the plaintiff the following sums as contractual payments which are to be credited towards the debt which he owes: (a) the sum of $17,295.29, which is the total of properly claimable payments in cash and services to the plaintiff, and (b) the sum of $12,000 represented by the Toyota Dyna vehicle which was supplied on 31 March 1994. The total of these two payments is by my calculation $29,295.29.

From the total debt of $50,000 this leaves a balance due of $20,704.71. This is the sum still owed by the defendant to the plaintiff under their contracts made in 1994. It is within the amount that the plaintiff has claimed. There is no contractual time limit on the payment, but the money is due and owing now as a judgment of the Court, and may be enforced accordingly.

COSTS

On this judgment, costs are awarded to the plaintiff, to be agreed or taxed.

SUPREME COURT TONGA

<u>NUKU'ALOFA:</u> *9 August 1999*

JUDGE