

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

CV 218 of 2010

BETWEEN : JOHN CVETKO

- PLAINTIFF

AND : 1. CLARE MAFI
2. 'ALUNGA KATOA

- DEFENDANTS

BEFORE THE HON. CHIEF JUSTICE SCOTT

Mrs. D. Stephenson for the Plaintiff
Mr. Kaufusi for the Defendants

DECISION

[1] The writ was issued in November, 2010. The Plaintiff claims that he contracted with the Second Defendant, as agent for the First Defendant for the supply of airline tickets for himself and his family. In breach of this contract no bookings were made and the Plaintiff lost the amount that he had paid to the Defendants for the tickets. The Plaintiff also claims damages for distress, worry and inconvenience.

[2] This is an application by the Second Defendant for a stay of the proceedings on the ground that he and the First Defendant's husband Chris Mafi have been charged with fraudulent conversion of the money paid by the Plaintiff to the Second Defendant. It is said that by being required to disclose the Defendants' defence to these proceedings, the right of the Second Defendant to silence in the criminal proceedings will be lost.

[3] Both counsel made helpful submissions. Mr. Kaufusi referred me to *Jefferson v Bhetcha* [1972] 2 All ER 1108 while Mrs Stephenson referred me to *Walter trading Co. Ltd v Ports Authority* [2008] Tonga L R.7.

[4] These cases are authority for the view that the question whether to stay civil proceedings when there are concurrent criminal proceedings arising out of the same transactions is discretionary. There is no inflexible rule based on the right to silence that excuses a defendant in civil proceedings from taking a procedural step. The onus of satisfying the court that a stay should be granted lies on the Defendant.

[5] It is notable that the step objected to by the Defendant in *Jefferson v Betcha* was the swearing of an affidavit in opposition to an application by the Plaintiff for summary judgment. In the present case the application is not to stay the giving of evidence but to stay the filing of pleadings.

[6] The author of *Phipson on Evidence* 14th Edn. , citing authorities state at paragraph 34-12.

“Pleadings are admissible, in subsequent pleadings, prove their own existence, the institution of the suit and the facts in issue between the parties. But being regarded in other respects rather as suggestions of counsel than the declarations of the parties, they are not receivable to prove the truth of the facts stated, even as admissions, unless verified by oath or signed; or otherwise specifically adopted by those against whom they are tendered”.

[7] In the circumstances of this case I am not satisfied that the Defendants have shown that by filing a Statement of Defence the Second Defendant's rights in the criminal proceedings will in any way be compromised. Accordingly the application fails.

DATED: 17 February, 2011


CHIEF JUSTICE