

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 38/96

BETWEEN: LOTTO SAMOA GAMES LIMITED a
duly incorporated company
having its registered office at
Vaigaga:

Plaintiff

A N D: WESTERN SAMOA SPORTS FEDERATION
a duly incorporated society
under the Incorporated
Societies Ordinance 1952 having
its registered office at Apia:

First Defendant

A N D: TOTALISATOR AGENCY BOARD a body
corporate established by the
Betting (Totalisator Agency)
Act 1988:

Second Defendant

Counsel: R T Faaiuso for plaintiff
R Drake for first defendant
P Tanielu for second defendant

Hearing: 14 & 15 March 1996

Judgment: 15 March 1996

Reasons for Judgment: 11 April 1996

JUDGMENT OF SAPOLU, CJ

The plaintiff is a registered company operating the game of lotto popularly known as "Lotto Samoa". The first defendant is perhaps the main sports body in the country. The second defendant which is the Totalisator Agency Board, is a

statutory body which is set up under the provisions of the Betting (Totalisator Agency) Act 1990 with powers to issue licences for lotto and other games of chance.

On 11 March 1996 this Court, upon a very urgent ex parte motion for an interim injunction by the plaintiff, issued an interim injunction to restrain the second defendant and any person acting by or through it from conducting the game of lotto in Western Samoa and from selling "Samoa Tattslotto" which is the name by which the first defendant's proposed lotto operation is called. The same interim injunction, upon application by the plaintiff, also restrained the second defendant from issuing a lotto licence to the first defendant. The Court also ordered that the ex parte motion be served on both defendants and this matter was set down for mention on 13 March. On that day all parties concerned appeared and the defendants filed separate motions to rescind the interim injunction which was granted ex parte on 11 March. Because of the exigency of the situation, the case was then adjourned to 14 March for hearing the motions to rescind.

During the argument on the first day of hearing, it became clear that the second defendant had already granted to the first defendant on 28 April 1995 a licence to operate a "scratch" lotto and on 18 August 1995 a licence to operate a Keno lottery and a lotto. So the situation insofar as the issuing of a lotto licence to the first defendant was concerned was a *fait accompli* and the interim injunction issued on 11 March to restrain the second defendant from issuing a lotto licence to the first defendant was inappropriate. Accordingly the interim injunction against the second defendant was discharged.

It also became clear during the first day of the argument, that the real issue in this case was whether or not the second defendant had in 1991 granted an exclusive licence to the plaintiff to operate the game of lotto in Western Samoa so that the lotto licence granted by the second defendant in 1995 to the first defendant was in breach of the exclusive licence alleged to have been issued to the plaintiff, and therefore the first defendant's proposed lotto operation must be stopped. Out of extra caution and because of the exigency of the situation in this case, the Court decided to further adjourn the matter to the following day, 15 March for the plaintiff's managing director and the second defendant's chairman who have both filed sworn affidavits to appear and give oral evidence.

After hearing that oral evidence, and after considering all the affidavit evidence and materials presented in this case as well as the submissions by counsel, the Court decided to also discharge the interim injunction which had been issued against the first defendant. Counsel were informed that I will prepare a written judgment to be made available to them in due course. This is that written judgment.

Reduced to its bare essentials, the real issue in this case is whether or not the second defendant issued an exclusive licence in 1991 to the plaintiff to operate the game of lotto in Western Samoa. Whether the interim injunction against the first defendant should be maintained or discharged depends on the answer to that issue. Counsel for the plaintiff in his well presented argument contended that on 25 October 1991 the second defendant granted to the plaintiff an exclusive licence to operate the game of lotto in Western Samoa for a period

of 5 years, and on 31 January 1992 that period of time was extended to 10 years. If the argument by counsel for the plaintiff is right then it necessarily follows that the second defendant was acting in breach of that exclusive licence when it granted in 1995 a further licence to operate a lotto to the first defendant. It further follows that if the first defendant's lotto operation is allowed to go ahead, that lotto operation will in effect be carried out in contravention of the exclusive licence already granted to the plaintiff. Counsel for the defendants in equally well presented arguments, denied that an exclusive licence was granted in 1991 to the plaintiff to operate lotto in Western Samoa. If their arguments are right then the interim injunction against the first defendant must be discharged. As has already happened, the Court has discharged both injunctions which had been issued against the defendants. That means the Court found that no exclusive licence was granted to the plaintiff in 1991.

I do accept the evidence by the plaintiff's managing director that he did raise with the second defendant's chairman the question of an exclusive licence for the plaintiff to operate lotto in Western Samoa before the plaintiff applied for a licence on 22 April 1991. However, and with respect to the plaintiff's managing director, I am not able to deduce from the evidence and material before the Court that there was a *consensus ad idem*, that is, a meeting of minds or agreement between the plaintiff's managing director and the second defendant's chairman on the question of an exclusive licence. More particularly, I am not able to find that there was any mutual consensus or agreement on the question of an exclusive licence between the plaintiff and the second defendant which is vested by the relevant statute with the power to grant lotto licences.

In his evidence, the plaintiff's managing director says that he left the meeting in which he discussed in 1991 with the second defendant's chairman the question of an exclusive licence with the firm belief that any lotto licence to be granted to the plaintiff would be an exclusive licence. He apparently based that belief on what is stated in paragraph 4 of his affidavit as follows :

"In the course of the meeting which occurred some time prior to 22 April 1991, I said to the Minister of Finance words to the effect : 'We need an exclusive licence to run lotto for about '10 years'".

Apparently there was no response from the Minister of Finance who is also the second defendant's chairman. In both his oral and affidavit evidence, the second defendant's chairman stated that no exclusive licence was granted to the plaintiff to operate lotto in Western Samoa.

In my view what this conflict in the evidence highlights is the fact that two respectable gentlemen of good standing in a community can honestly hold two opposing understandings or interpretations of the circumstances surrounding a particular factual situation. And because of the conflicting understanding or interpretations, it cannot be said that there was an agreement. That seems to be what has happened in this case. The plaintiff's managing director thinks that when he said words to the effect that the plaintiff needs an exclusive licence to run lotto for 10 years and there was no response from the second defendant's chairman that implied an exclusive licence was granted to the plaintiff. On the other hand the second defendant's chairman says that no exclusive licence was granted. While in some circumstances silence implies consent, I am of the respectful view this case was not one of them. The circumstances are not

sufficiently strong to persuade this Court that the absence of a response from the second defendant's chairman to what was said by the plaintiff's managing director implied that an exclusive licence was to be granted to the plaintiff. In any event, the power to grant a lotto licence is vested in the Totalisator Agency Board, which is the second defendant, and not its chairman. I will come back to that point.

I am reinforced in the view that no exclusive licence was granted to the plaintiff by the fact that the plaintiff's application for a lotto licence dated 22 April 1991 does not refer to an exclusive licence but simply a licence to operate lotto. Likewise the written approval dated 25 October 1991 from the second defendant of the plaintiff's application does not refer to an exclusive licence but simply a "permit" to operate lotto. The evidence also suggests that after the grant of the lotto licence to the plaintiff the question of an exclusive licence continued to be discussed between the plaintiff's managing director and the second defendant's chairman.

Furthermore, the power to issue a lotto licence is vested by section 16 of the Betting (Totalisator Agency) Act 1990 in the Totalisator Agency Board and not its chairman. Any discussion between the plaintiff's managing director and the second defendant's chairman concerning an exclusive licence was not a discussion involving the second defendant which is a separate legal entity from its chairman, unless there is evidence that the second defendant's chairman was engaged in such discussion with the actual or ostensible authority of the second defendant. But there is no such evidence. Accordingly, the absence of any response from the second defendant's chairman when the plaintiff's managing

director said the plaintiff needs an exclusive licence to run lotto for about 10 years cannot be construed as an absence of a response from the second defendant which is really the entity vested with the necessary power. The position might have been different if there was evidence of actual or ostensible authority from the second defendant for its chairman to commit the second defendant to the plaintiff for then principles of agency and estoppel would have come into play and would require consideration.

Counsel for the plaintiff also placed much emphasis on the use of the words "exclusive right" in the letter dated 6 October 1993 from the second defendant's chairman to the plaintiff's managing director to support his argument that an exclusive licence was in fact granted to the plaintiff. That letter says that the "exclusive right" granted to the plaintiff was terminated for the reasons stated in the letter. In reply the plaintiff's managing director by letter dated 12 October 1993 requested restoration of the plaintiff's exclusive licence. There was no reply from the second defendant or its chairman to that letter.

In his evidence on this aspect of the case, the second defendant's chairman says that the use of the words "exclusive right" in his letter of 6 October 1993 was an error and those words might have slipped into his letter because the question of an exclusive licence for the plaintiff was often raised in his meetings with the plaintiff's managing director. Counsel for the plaintiff however submitted that the use of the words "exclusive right" in the letter of 6 October 1993 from the second defendant's chairman supports his contention that an exclusive licence to operate lotto in Western Samoa was granted to the plaintiff.

I think here one has to go back to the circumstances in 1991 when the lotto licence was approved for the plaintiff and ask oneself whether what was said in a letter made two years later is a true reflection of what was granted to the plaintiff two years before. I have already dealt with what happened in 1991 and I am of the view the answer must be in the negative. In any event, even if one were to accept the contention for the plaintiff that an exclusive licence was granted to the plaintiff in 1991, the effect of the letter of 6 October 1993 from the second defendant's chairman was to terminate that exclusivity which was never again restored. Counsel for the plaintiff tried to get around that obstacle by arguing that the absence of a response to the plaintiff's request to restore its exclusive licence implied that the request was granted. I am also not able to accept that argument in the absence of any evidence to establish consent or acquiescence. Silence in these circumstances is not evidence of consent to or acquiescence in the request by the plaintiff. Perhaps what the plaintiff should have done if it had felt strongly that the termination in 1993 was wrongful was to challenge the validity of the termination by way of legal proceedings. But that was not done and therefore the termination has remained.

It follows from all this that when the second defendant granted another lotto licence in 1993 to the first defendant there was no constraint or restriction on its power to do so.

I should also mention that arguments were directed to the question whether under the provisions of the Betting (Totalisator Agency) Act 1990, the second defendant had power to issue an exclusive licence to any person to conduct the game of lotto in Western Samoa. In view of the conclusion I have already reached

it is unnecessary to decide that question.

For all those reasons, the Court decided to discharge the interim injunctions against the defendants.

TFM Sapala
.....
CHIEF JUSTICE