IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: **PELEIUPU NIFO** of
Moata'a, Contractor

Plaintiff

A N D: **TO'O TOETA** of
Toomatagi, Panel Beater

Defendant

Counsel: R T Faaiuaso for the Plaintiff
P A Fepuleai for the Defendant

Hearing Date: 12 August 1998

ORAL JUDGMENT OF JUSTICE YOUNG

Peleiupu Nifo as plaintiff sues Too Toeta as defendant.

This case illustrates once again the maxim that business and friendship do not mix and when they do, all too often disaster results.

The plaintiff's claim was amended with my permission part way through the hearing without objection by the defendant.

The amendments effectively increase the plaintiff's claim as follows - firstly, alleging that the amount paid for the cost of repairs was $2,600.00 and secondly that the purchase price of the van was $2,500.00.

Part way through the hearing the defendant abandoned two of the three counter claims.

I am therefore not required to deal with the counter claims set out in paragraphs 13 to 18 of the counter claim.

There are now two issues between the parties. Firstly, the plaintiff claims the defendant received his van and the cheque for $2,600.00 to carry out certain repairs. The plaintiff says that the defendant has never completed the repairs has wrongly held on to his van and the van is now effectively worthless. Associated with that claim is the sum of $600.00 paid the plaintiff says for a Dyna pick up shell. The defendant says that shell is connected to the repair of the van.

The second issue between the parties, is payment for the repair of church chairs. The defendant says he was a sub contractor to the plaintiff for the repair of some chairs. He says he has never been properly paid in full for the repair of the chairs. The plaintiff says that he has paid the defendant in full for the repairs done.

I deal with each of these cases separately. Firstly the Hi Ace Van. It seems to me even on the evidence of the defendant (if accepted) that the plaintiff's claim must succeed. I say that for these reasons. The defendant's evidence was, that the contract for the repair of the van was for a total price of $5,000.00. Half to be paid at the beginning and the other half close to the completion of the job.

The defendant says that he received $2,600.00 in two payments as part payment for the contract. On the defendant's evidence some work had been done on the conversion of the van, but much work still remains to be done. And certainly repairs have not reached the stage where the defendant could claim even on his own evidence the second half of the payment he says was due.

So, even if I accepted the defendant's evidence he is entitled to be paid nothing further because he has not finished the job. In fact on his own evidence he has effectively abandoned the work.

Describing the time frame will illustrate why. This repair began in February - March 1994, almost four and a half years ago. Several trucks could have been built in that time by the defendant.

The defendant's reason for not completing the repair was not credible. Firstly he said because he had not been paid the second half of what he was due, but on his own evidence he was not due for the second half of the payment until completion. So that reason cannot be sustained.

The second reason, he says was the plaintiff's call for him to do other work on other vehicles. But that reason cannot be sustained either because the work required of him on those other vehicles was at the most a few weeks, and four and a half years has passed. So it is clear that the defendant has abandoned the contract.

The defendant was clearly responsible for keeping the van in a good condition while it was in his possession. He has not done that, and the result is that, the van is now in a rusted and poor condition. So on the defendant's evidence, the plaintiff has lost the money for the repairs and lost his van.

So I repeat, even if I accepted the defendant's evidence completely, the plaintiff would succeed.

Turning briefly as an alternative to the plaintiff's case I deal now with the conflict in evidence between the plaintiff and defendant as to the arrangements for the repair of the van. As to the arrangements that took place I prefer the evidence of the plaintiff.

I found the plaintiff to be a direct, straight forward witness who I could be relied upon. I did not find that present in the defendant even allowing for the difficulties of translation and the understandable nervousness of witnesses in the witness box. I found the defendant's evidence evasive, difficult to follow and confusing. I reject his evidence on the essential aspects as unreliable. I am satisfied therefore that, as the plaintiff has said the agreed cost for the repair and conversion of the van was $2,600.00, and I am satisfied that the plaintiff paid that sum to the defendant for the repair. I am satisfied that the defendant has never completed the repair of the van, and I am satisfied as a result of the defendant's delay, the van is now effectively unusable.

The plaintiff purchased the van in the latter part of 1993. I accept that the purchase price was $2,500.00. In the circumstances it is reasonable to assume the value of the van when the repairs began in April 1994, was the same as the purchase price. So the plaintiff has lost the value of the van and the payment for repairs.

I turn to the purchase of the Dyna pick up shell.

The plaintiff's evidence was that this was an independent arrangement apart from the repair and conversion of the van. The defendant claimed that the money for the shell was part of the total repair for the conversion of the van.

On this mater I also prefer the evidence of the plaintiff. I do not think that the plaintiff ever anticipated that the Dyna pick up shell would be used as part of the conversion of the van in the way the defendant proposed. I am satisfied that the plaintiff paid the defendant $600.00 for the shell. While half of the shell may have been used for the conversion of the van, the plaintiff has never seen the value of it. He does not have the windscreen (part of the shell) he anticipated nor does he have that part of the pick-up used in the repair of the van.

For both those reasons, therefore, there will be judgment for the plaintiff. Firstly in the sum of $2,500.00, the value of the van, secondly the sum of $2,600.00 being the amount paid for the repairs, and thirdly the sum of $600.00 that money being paid for the Dyna shell - a total of $5,700.00.

No evidence of strength was called with respect to the prayer for general damages and I dismiss that part of the plaintiff's claim.

I turn now to the counterclaim and the chairs. There is a fundamental disagreement between the plaintiff and the defendant as to the terms of the contract.

The defendant claims there was to be paid $35.00 per chair $25.00 to him and $10.00 to the plaintiff. The chairs were to be repaired and painted and return to the church from which they come.

The plaintiff said in evidence while he hoped initially to receive $35.00 per chair, the church as a result of a tender process was only prepared to pay $20.00 per chair.

Having heard the evidence of the parties I think the defendant has become confused between the plaintiff's hoped for price and the final contract price, and that he has turned the hoped for price in his mind into the contract price.

Again on this matter, I prefer the evidence of the plaintiff. The way in which he explain the process for the contract price the initial hoped for price and the final price were credible. I am therefore satisfied on the evidence that I heard that there was a contract between the plaintiff and the defendant to carry out the repair and painting of the chairs. But that there was never a clear agreed price that the plaintiff would pay the defendant for the work.

Given that there was a clear contract without a defined price the proper course is for me to substitute my judgment as to what is a fair and reasonable price to be paid by the plaintiff to the defendant for the repair. Then I will resolve the question of what if any payment the plaintiff has already made to the defendant.

I am satisfied on the evidence that I have heard that the church has only paid $20.00 per chair for its repair. The reasons for this is as I have previously mentioned when I discussed the contract price. I am satisfied on the evidence that I have heard that 100 chairs only have been repaired. I am satisfied that the evidence of the plaintiff as to this matter is most accurate. He and his wife were precise with numbers, the defendant in contrast was not and was only able to give ranges of numbers. I am satisfied also that the plaintiff received from the church the sum of $2,200.00 for the repair of the 100 chairs then $20.00 per chair plus GST. Before I return to the question of reasonable payment, I will deal with the question of the $800.00.

The plaintiff says he has paid the defendant $800.00 for the work on the 100 chairs. He has supported in this by the evidence of his wife. The defendant denies ever receiving the $800.00. He says he received only $100.00 and some food. Again, I prefer the evidence of the plaintiff. The defendant's evidence changed significantly as to when the $100.00 was alleged to being paid and again I did not find the defendant's evidence on this straight forward or convincing. In contrast I thought the evidence of the plaintiff and his wife was straight forward and convincing.

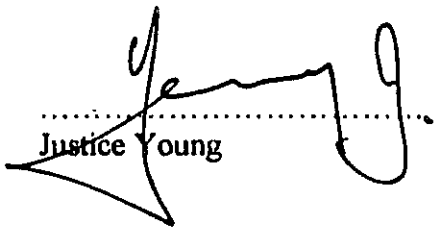
So I am therefore satisfied of the $2,200.00 received for the repair of the chairs that it has been currently divided in this way - $700.00 for the payment of paint and other materials, $800.00 to the defendant and the remaining $700.00 the plaintiff has retained.

The Plaintiff accepts, I think, that most of the work done on the chairs was the Defendants or his agents, but the contract was the Plaintiff's. The current division of $700.00 and $800.00 however hardly seems fair. The Defendant in my judgment should give more for the work that he did.

I assess the additional money to be paid by the Plaintiff to the Defendant on nothing more than a basic assessment of what I believe is fair and reasonable as I must do. I therefore give judgment with regard to the Defendant's counterclaim against the Plaintiff for a further $300.00. Thus the $2,200.00 received should now be divided in this way - the Defendant to receive the sum of $1,100.00 or which I find $800.00 has already paid. The Plaintiff has already paid the sum of $700.00 towards the paint and he to retain the final $400.00 the plaintiff's profit. So to summarise, the Defendant shall have judgment against the Plaintiff in the sum of $300.00 on the claim for the chairs.

As to costs the Plaintiff must have costs on its successful claim based on its judgment for $5,700.00 and the Defendant must have costs on the sum of $300.00 in its successful counter claim.

I leave the parties to agree, if possible, as to quantum failing which either to be settled by the Registrar or refer to me for resolution.



Justice Young