

Tu'itupou v Cocker & Other

Supreme Court
Case No.126/1988

31 October, 1989

*Partnership - existence of - principles for determining - Partnership Act 1890
UK applied*

10

Evidence - burden of proof in civil proceedings

The plaintiff sued the defendants for various sums, including a sum alleged to be due under a partnership agreement which he alleged had been made between himself and the defendants with regard to the ownership or use of a backhoe tractor in 1985. The judgment is reported only with regard to the existence of the partnership.

HELD:

20 Dismissing the claim.

- (i) The Partnership Act 1890 UK applies in Tonga with regard to the existence of partnerships.
- (ii) The plaintiff had not discharged the burden on him of proving on the balance that a partnership existed.

Cases considered:

30 Rhesa Shipping Co Ltd v Edmunds [1985] 2 All ER 712

Statutes considered:

Evidence Act, ss 104 - 106
Partnership Act 1890 UK, s1, 2

Webster J

USP Enclave Company Limited

Judgment

In this case the Plaintiff Tevita Tu'itupou sues the Defendants Roy Cocker and Royco Industries Ltd for sums due under an alleged partnership over the ownership or use of a backhoe tractor in 1985. The Plaintiff also sues on 2 other matters between the parties which arose at the same time, namely the cost of a small amount of steel and the proper rate for the hire of trucks over a short period.

Both the Plaintiff and the Defendants are in business as trucking contractors. In addition the Defendants have considerable other business interests in stevedoring, quarrying and property.

The Defendants denied the Plaintiff's claim of an alleged partnership and submitted that the other 2 claims had been settled in full and the Plaintiff was therefore estopped from suing for them.

Applicable law on partnership

It was agreed by the parties that the law to be applied in respect of the alleged partnership was English law by virtue of the Civil Law Act (Cap. 14) and thus that the U.K. Partnership Act 1890 applied. Partnership is therefore defined as "the relation which subsists between persons carrying on a business in common, with a view of profit" (s.1) and in s.2 it is provided, among other things -

"In determining whether a partnership does or does not exist, regard shall be had to the following rules -

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership, does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

.....

(3) The receipt by a person of a share of the profits of a business in prima facie evidence that he is a partner in the business; but the receipt of such a share, or of a payment contingent on or varying with profits of a business, does not of itself make him a partner in the business, and in particular"

The question whether or not there is a partnership is one of mixed law and fact (Keith Spicer Ltd v Mansell [1970] 1 All ER 462 (CA)) and the whole circumstances have to be considered to see what was the intention of the parties (Mollwo, March & Co v Court of Wards (1872) LR 4PC 419). Subsequent conduct can only be looked at in order to show that the agreement has been varied or a new agreement made (Re Beard & Co, ex parte Trustee (1915) HBR 191 (CA)), but the mode of dealing adopted by partnership if those terms are not set out in any document (Halsbury's Laws (4th Ed) Vol.35 para 39).

"Partnership arises from contract, evidenced either by express words or by conduct from which the existence of a partnership is to be inferred. It is not sufficient that there is joint ownership in common; there must be a contract. Statements and declarations, even such as include the use of the words "partnership" and "partners", do not prove that the persons making them are partners. That question can only be decided on the whole of the evidence, their conduct, the mode in which they dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people".

(Dawson v Helicopter Exploration Co Ltd (Canada) (1956-8) reported in the English and Empire Digest Vol. 36 (2) 593)

A partnership agreement may be proved by oral evidence:

(Halsbury's Laws (4th Ed) Vol.35 para 38 and cases cited there).

Finding on evidence of alleged partnership

Looking briefly at these factors one by one -

Part ownership

What the Court, on the evidence, believes occurred was that Mr Tu'itupou bought the machine for Mr Cocker either as an agent or as a middleman, his recompense for the reduced price being, in non-monetary terms, the use of his trucks on the wharf project. So there was no part ownership, but even if it had been proved, it would not of itself have created the business relationship of partnership.

Sharing profits

On the evidence there was insufficient proof that this had been agreed, but even if it had been proved, it would not of itself have made Mr Tu'itupou a partner with Mr Cocker.

Whole circumstances and mode of dealing

Despite the evidence of Mr Tu'itupou, the whole circumstances of the incident do not add up to the creation of a partnership. It is for a start an improbable relationship for a large contractor to make with a small contractor. Mr Cocker is a successful and business like business man and would have been expected to go about things efficiently if there had been a partnership, with more meetings and generally more arrangements consistent with a partnership, but there was no evidence of such dealings with each other. Nor was there any independent evidence of dealings with outside persons to show that there was a working partnership.

Contract

This was not proved directly and cannot be inferred from the conduct of the 2 parties. So the whole picture does not really add up to a partnership under the law.

If the Court had to find on the balance of probabilities that one party's account of the alleged partnership was more credible than that of the other party; the Court would probably have preferred Mr Cocker's account that there was no partnership as being the more credible, both on his own evidence and on independent external evidence and a common sense view of the matter. Clearly some of the inconsistencies in Mr Cocker's evidence could be explained by the events of 1985 slowly coming back to his mind during the course of the trial, though this could not account for all the inconsistencies.

Failure to discharge burden of proof

But the Court does not have to make such a decision that one party's version of what happened is more likely. In the English House of Lords case of Rhesa Shipping Co v Edmunds [1985] 2 All ER 712 (HL); (1986) LRC (Comm) 90 which by virtue of the Civil Law Act, and there being no contrary law in Tonga, applies here, Lord Brandon of Oakbrook said (p.718 c, 97 - 98), and it is relevant to quote at some length, -

"The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. he has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take" (my emphasis).

"..... the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden."

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In this case under sections 104 to 106 of the Evidence Act (Cap.13) the burden of proving that there was a partnership clearly falls on the Plaintiff. Sections 109 (ownership in disputed cases) and 111 (alteration of established relationship) do not assist him. The Court has to conclude that because the evidence as a whole of the Plaintiff is not totally reliable, and he produced no other witnesses and no sound documentary evidence, and in any event because the evidence of a partnership is slight and not conclusive, the Plaintiff has failed to establish that a partnership existed.