

Ackerman v Muti

Supreme Court, Nuku'alofa

Webster J.

Civil case No 74 / 1986

23, 24 February; 31 July, 1 August 1989; 26 January 1990

- ¹⁰ *Contract Act – enforceability – Contract Act applicable to contract made outside Tonga*
Contract Act – not applicable to contract for purchase of shares in company
Contract – breach of contract to purchase shares in company
Tort – deceit – elements of liability

²⁰ The plaintiff gave the defendant \$4,000 to be used for the purchase by the plaintiff of a 50% shareholding in a company which the defendant claimed to operate in Tonga. The agreement was made in Hawaii. When the shareholding was not purchased for the plaintiff and the money was not returned by the defendant, the plaintiff sued the defendant for breach of contract and also for the tort of deceit.

HELD:

- ³⁰ (1) A contract was in existence between the parties whereby the defendant agreed to purchase for the plaintiff a 50% shareholding in the company;
(2) The provisions of the Contract Act (being procedural) would apply in Tonga notwithstanding that the contract was made in Hawaii, but did not apply to this contract since it was a contract for the purchase of shares in a company;
(3) On the facts, the defendant was liable for breach of contract;
(4) Alternatively, the elements of liability for deceit were present and the defendant was also liable in tort.

Cases considered :

Lolohea v Collett P.C. Appeal 6 / 1988

Counsel for the plaintiff : Mr K. Taufateau and Mr S. Hola

⁴⁰ Counsel for the defendant : Mr M. Paasi

Judgment

The Plaintiff Jack Ackerman of Hawaii sued the Defendant Paula Muti for the return of US\$4000 paid to Mr Muti by him in Hawaii on or about 16th April, 1985 to purchase a 50% share in an alleged loan company of Mr Muti's in Tonga called the Southern Cross Travel and Loan Agency. Mr Ackerman claims that Mr Muti failed to purchase such a share for him. Alternatively Mr Ackerman claims that Mr Muti knew and fraudulently induced him to buy shares in a company which was a sham, thereby causing him loss.

50 The Defendant Mr Muti claimed that the Contract Act (Cap. 113) applies and as the agreement was only a verbal one not duly registered the Plaintiff cannot sue on it; that in any event the money was given as a loan and the company went into loss and died out because of debts unpaid. Further the Defendant said that the US\$4000 was paid back in kind with cash, goods and other work for the Plaintiff and by the provision of an office for him in the Taumoepeau Building, Nuku'alofa for around a year. The Defendant denies any fraudulent misrepresentation.

This case was heard along with Case 5 of 1988 between the same parties, in which a decision for the Plaintiff was given on 4th August, 1989. The Plaintiff gave evidence himself and led evidence from Mr Laki Niu, who had at one time
60 acted as lawyer for both parties before this dispute became serious, and from Mr Sione Vuna Fa'otusia an Assistant Secretary in the Ministry of Labour, Commerce and Industry in charge of the Register of Companies. The Defendant gave no evidence himself and led no witnesses. On the evidence I find the following facts proved -

1. Mr Ackerman gave Mr Muti US\$4000 in Hawaii on or about 16th April, 1985. In doing so Mr Ackerman believed that it was payment for a 50% share in the Southern Cross Travel and Loan Agency, to take over the share in the company of Mr Muti's Tongan partner in Hawaii. There was no written agreement about this
70 payment, which was made by cheque in Hawaii.

2. Mr Ackerman made this payment because he had already seen Mr Muti receiving interest on repayments in loans in a room at the Ministry of Civil Aviation in Nuku'alofa and liked the built-in collection system.

3. Mr Ackerman never saw any papers or accounts of the company either before or after he paid Mr Muti the money. Nor did he ever take any part in running the company, although he frequently asked Mr Muti for the opportunity to do so. He did not know that the lending of the company at interest of 10% per quarter or 40% per year might be illegal under section 13 of the Contract Act.

80 4. The only formal evidence of the existence of the company shown to the Court is a note giving its name as an associated company at the foot of the notepaper of Imua Pacifica Co Ltd (Exhibit 1). Mr Fa'otusia gave evidence that no company with the name Southern Cross Travel and Loan Agency has ever been registered in the Register of Companies.

5. Mr Muti did for several months or about a year provide an office or a share of an office with some furniture for Mr Ackerman in the Taumoepeau Building, Nuku'alofa, but Mr Ackerman did not have sole occupation of the office. The cost
90 of providing or renting this office was not proved.

6. Apart from any question about the office, Mr Ackerman never received any returns from the company and did not receive any document showing that he owned a share in the company. He has not received repayment of the US\$4000 he paid, neither when he asked for it nor ever.

7. Mr Ackerman completely denied that he had received repayment of the money in kind by way of accomodation, food, drink and living expenses. He said such expenses were covered by sums of US\$26,000 and US\$14,000 he had earlier paid to Imua Pacifica. As there was no evidence to contradict this I accept Mr Ackerman's denial.

8. While there may have been more than one meeting arranged for the two men to discuss the matter with Mr Niu, at one meeting, which had been set up to produce a legal agreement between them about the company, Mr Muti went to Mr Niu before the time for the meeting and, while accepting that the payment had been made to purchase a share in the company, said it was only for a 20% share, which Mr Ackerman denied. As any company there may have been is now defunct and Mr Ackerman only seeks return of his money, this is an academic matter in the context of this case, though it can only cast a shadow on the standing of Mr Muti.

9. Although Mr Ackerman's recollection of events 4 years ago was not perfect, in general I accept his evidence as being truthful. I do not accept the submissions on behalf of the Defendant that his memory was not reliable due to his heavy drinking: his previous lawyer Mr Niu said that he had found Mr Ackerman to be consistent and that he did not contradict himself unless he changed his mind.

The Defendant's Counsel Mr Paasi did not deny that the Defendant had received the money (and I accept the Plaintiff's evidence that it was paid) but Mr Paasi relied entirely on his cross-examination of the Plaintiff about the office and the Plaintiff's allegedly poor memory, however as I have said there was no real evidence of what the rent or cost of the office was. The defence cross-examination on the affairs of Imua Pacifica or the events surrounding them are not really relevant to his case despite the attempts of the Defendant to draw them in.

Mr Paasi also submitted that the Contract Act applied. I agree that the Act might apply to a contract of this nature even if made overseas in Hawaii if the agreement is sued on in the courts of Tonga, as was set out in the recent Privy Council case of *Lolohea v Collett (Privy Council 6 of 1988)*

"It is the law that the procedural form of a contract is governed by the *lex fori* of the Court in which proceedings founded on a contract are instituted, because all matters pertaining to procedure or evidence are part of the procedure of that Court."

The law is stated thus in Halsbury 4th Edition Vol. 8 at Para 775:-

"The rule of English law that no action can be brought on a contract of guarantee or on a contract for the sale, or other disposition of land, or an interest in land, unless the agreement or some note or memorandum of it is in writing is a rule of procedure and may render a contract unenforceable in England even if it is valid by its proper law."

Section 4 and 3 and 5 of the Contract Act contains very clear procedural requirements - if a receipt of one kind or another is not produced the action is not maintainable.

People who enter into arrangements, such as in this case, without proper legal advice are "simply asking for trouble."

In this case the rules of procedure in the Act imperatively require certain kinds of obligation to be proved in a particular way.

150 However in this case the contract was not one to which the Act applied, not being for "goods supplied or to be supplied money lent or to be lent or services to be rendered" (section 2). As stated in my ruling on 1st August, 1989 on the submission of no case to answer by Mr Paasi, this was not a contract for goods to be supplied as shares or an interest in a company do not come within the meaning of goods, which are personal chattels (i.e. movable tangible articles); nor was it a loan as although this was alleged by Mr Muti in his pleadings it was denied by Mr Ackerman and Mr Niu, whose evidence I accept; nor was it a contract for services to be rendered as even if the contract was that Mr Muti was to obtain the share from his previous partner there was no evidence that, if by so doing Mr Muti was rendering a service, he was receiving any consideration for that, therefore there was not a contract for services to be rendered.

160 On the facts which I have found to be proved I accept that Mr Ackerman gave US\$4000 to Mr Muti to purchase a share of 50% in the company (though as stated it is immaterial whether it was 50% or 20%) from Mr Muti's then Hawaiian partner and that in effect Mr Muti has never done this, so that Mr Ackerman is entitled to his money of US\$4000 back as claimed with interest on it at 10% from 16th April, 1985. However judgment cannot be issued until a certificate of the relevant TS equivalent is produced.

In case I am wrong in this, I must also consider the alternative case of fraudulent misrepresentation: that Mr Muti induced Mr Ackerman to part with the money on the basis that the company existed, whereas in reality it was a sham. The requirements for establishing fraudulent misrepresentation or the tort of deceit are set out in *Halsbury's Laws (4th Ed) Vol. 31 at para. 1091*. There must be -

- 170 (a) representation of a present or past fact said, written or done so that it amounts to a representation (*paras 1005 to 1026*)
- (b) the Defendant being the representor and the Plaintiff the representee, as happened in this case (*paras 1027 to 1043*)
- (c) the representation being false (*paras 1050 onwards*) and here no evidence was produced that there was any company so the Defendant's representation that there was a company must have been false.
- 180 (d) the inducement (i.e. the result and object of the representation (*paras 1066 and 1069*) being material) by tending to induce the actual act of the Plaintiff (*para. 1075*). On the evidence this was so here. I accept this even though Mr Taufacteau did concede that an ordinary man would be put on his guard if he was offered half of a loan company for only US\$4000, as Mr Ackerman said that he believed that the company was only in its infancy at the time.
- 190 (e) an alteration of the Plaintiff's position (*para. 1079*), in other words he acted on it, as Mr Ackerman did here by paying over US\$4000.

(f) fraud, in that the Defendant did not honestly believe that what he said was true, or that he said it recklessly, without a belief in its truth (*paras 1057 to 1062*). Mr Taufaeatu for the Plaintiff submitted that the misrepresentation was about the company, which was a company which the Defendant knew did not exist, and as there was no contradictory evidence from the Defendant I accept this. A company or business cannot exist merely in a man's head or as a footnote on a sheet of notepaper and Mr Muti must have known that the company had no solid existence. Seeing him collecting loan interest is not enough to prove the company's existence either.

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(g) damage to the Plaintiff (*para. 1092 to 1094*) which is obvious here in that he has not got his money back or any return on it.

So all the elements of fraudulent misrepresentation are present in this case and have been proved. The Plaintiff did then repudiate the agreement by asking for his money back, which has not been done and so he is entitled to damages for the tort of deceit. Therefore on this ground also I alternatively award the Plaintiff the damages which he sued for against the Defendant, namely payment of US\$4000 plus interest at 10% from 16th April, 1985. Again a certificate of the T\$ equivalent is required.

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I also award costs as agreed or taxed to the Plaintiff against the Defendant.