

Bank of Tonga v Peacock

10 Supreme Court, Vava'u

Lewis J

C500/94

25 May 1995

Evidence Act-admissibility-document-copy

20 This was a ruling on the matter of the admissibility of a copy of a bank diary during an application.

Held:

- (1) The copy document was not admissible as not being primary evidence or within any exception
- (2) Secondly, and in any event, even if not a copy, it could not be admissible to prove, or as an aid to, the interpretation of the provisions of the security document executed by the parties.

30 (The judgment of the substantive trial published in 1996 Tonga Law Report)

Statutes considered: Evidence Act ss. 2, 62, 63, 64, 78-86

Counsel for plaintiff: Mr Appleby

Counsel for defendants: Mr Edwards

Judgment

This ruling in written form is made at the request of counsel for the Plaintiff and concerns the admissibility or otherwise of documentary evidence. The document is comprised of 2 pages bearing the title "Bankers Diary." Subject to the objection made, I admitted the document and it bears the exhibit number P4. P4 was admitted into evidence on the application of the applicants, Mr. and Mrs. Peacock (the defendants in the substantive action)

40 The defendant Gavin Peacock, (the first defendant,) gave evidence in support of his application to vary the injunction. It is necessary to briefly describe the nature of his application. The defendants obtained a loan from the plaintiff bank. The parties had differences. The plaintiff sued the defendants. Injunctive relief was sought and obtained by the plaintiff. The applicants, (the Peacocks,) allege that the injunction was preventing them from properly producing a vanilla crop, and they sought a variation of the terms of the injunction.

50 Pursuant to an order of the court, the parties gave and made discovery of all documentary evidence in their power, possession, custody or control. An inspection of documents held by the plaintiff was made by the first defendant. The unchallenged evidence of the first defendant is that he came into possession of exhibit P.4 during that inspection of the plaintiff's documents, freely and unconditionally.

An issue springing from the differences between the parties is the extent to which property of the defendants is mortgaged or charged as security for the loan from the plaintiff Bank.

The first defendant has given evidence that certain "Vanilla Stock" referred to in the mortgage document was not charged as security for the loan, but that term related to vanilla stock undergoing a curing process in a curing shed at the defendants curing shed on their property at Mataika at Vava'u.

60 (The judge then summarised the history of this matter and the evidence about the document).

The provisions of the Evidence Act relating to documents are lengthy. I do not propose to interpolate them. It is sufficient to say that documentary evidence is an exception to the general rule that all facts may be proved by oral evidence.

The contents of documents must be proved by primary evidence. "Primary Evidence" means the document itself produced to the court for present purposes.

There is no doubt that P4 is a "Document" within the meaning of section 2 of the Evidence Act.

70 Where a document is only a copy of a common original, S63 (c) of the Act would appear to preclude the admission of such a copy into evidence. P4 appears to be a copy of the original document and on that ground would appear not be admissible.

The essential argument is just how far the security was intended to extend, and although it was not made clear in evidence, it is probable that Gavin Peacock intended that the document P4 would enable him to demonstrate to the satisfaction of the court that the intention of the security document which the bank prepared and which the Peacocks executed, was never to extend to the growing crops.

80 The evidence of Gavin Peacock is that only the land was intended to be charged to the bank, not the growing crops. The bank officers during an inspection took notes of what was at the Peacocks' property. Then Gavin Peacock said "I have the notes in front of me."

He then read from the note and it was at the point of his reading that Mr. Appleby made the objection which led to the ruling by the court.

I conclude that the intention of the witness Peacock was to use the note to demonstrate that the extent to which the mortgage extended was never intended to extend to the growing crops.

Such a use is clearly proscribed by the provisions of the Evidence Act. First, the Bankers diary is not "Primary Evidence" within the meaning afforded it by sections 62, 63 and 64 of the Evidence Act. Second it does not comply with the prescriptions imposed by sections 78 to 86 of the Evidence Act.

I conclude that the only use to which the document can be put is as evidence of the way in which the witness Peacock came by it, but never as to the truth of its contents nor as an aid to the interpretation of the provisions of the security document executed as between the parties.