

Answer from MC

IN THE SUPREME COURT OF TONGA

APPELLATE JURISDICTION

NUKU'ALOFA REGISTRY

AM 33 of 2011

[MC CV 79/2011]

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BETWEEN: MA'AFU TONGA - Appellant

AND : TANIELA VAITOHI - Respondent

Fa'otusia for the Appellant

Piukala for the Respondent

### JUDGMENT

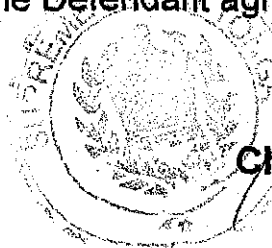
1. The plaintiff/Appellant claimed \$1900 which he stated was the cost of repairing a motor car which was imported on his behalf by the Defendant/Respondent from New Zealand but which was found on arrival in Tonga to be damaged.
2. Apparently, a statement of defence was filed but despite the hearing of the appeal being adjourned part-heard in order to allow the papers to be put in order, I was not supplied with a copy. According to Mr. Piukala the Defendant denied having "anything to do" with the damage to the car.
3. The Plaintiff gave evidence but unfortunately counsel, the witnesses and the magistrate, rather than focusing on the central question, which was whether the Defendant was liable for the damage or not, turned their attention to a secondary question which was whether the Plaintiff and the Defendant had agreed that the car could be repaired in a garage of the Plaintiff's choice with the cost, \$1900 (which it was not disputed was actually incurred by the Plaintiff in having the car repaired - see Exhibit 1) being met by the Defendant.

4. After hearing both parties the magistrate decided that he was not satisfied on the balance of probabilities that the Defendant had proved his case. Accordingly, the claim was dismissed.
5. Mr. Fa'otusia says that the magistrate erred in his evaluation of the evidence and that the transcript of the proceedings in the magistrates' Court was fundamentally incorrect. He asks for the judgment to be set aside and for the matter to be remitted to the magistrates' Court for retrial before another magistrate. Mr. Piukala did not accept that the magistrate had erred and asked for the appeal to be dismissed.
6. In my view, neither of Mr. Fa'otusia's arguments can succeed. An appeal court is slow to reverse findings of fact by a lower court, including evaluations of credibility (*Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326) and while a transcript may contain errors, the appeal court will find itself bound by the transcript in fact produced unless it is agreed to be faulty or there is some evidence to show that it is in fact faulty. In the present case Mr. Piukala did not agree that the record was incorrect and there was no evidence, beyond Mr. Fa'otusia's assertion, that it was not accurate.
7. In my opinion, the appeal must succeed because the case was decided on the wrong question, not because the wrong question was wrongly decided.
8. The matter will be remitted to the Magistrate's Court for retrial on the following question:

"Was the Plaintiff's car damaged while in the Defendant's care and after it had been consigned to the Defendant by the Plaintiff in order for it to be transported from New Zealand to Tonga?"

If the answer to that question is in the affirmative then the Defendant will be responsible for the reasonable cost of its repair. In my opinion the Plaintiff would be fully entitled to take the car to be repaired by a garage of his choice, whether or not the Defendant agreed.

18 May 2012



Chief Justice