IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 227/93

BETWEEN: TOETA SIUI of Lufilufi in Western Samoa, Planter

Plaintiff

A N D: MAUINATU ROY ETEUATI of Sydney, Australia, Businessman

Defendant

Counsel: Mr P.A. Fepuleai for Plaintiff
Mr T.K. Enari for Defendant

Date of Hearing: 29 October 1993

Date of Judgment: 17 December 1993

JUDGMENT OF SAPOLU, CJ

The plaintiff claims from the defendant the sum of AUD$10,332 for a consignment of taros shipped to the defendant in April this year. The defendant denies liability and counterclaims against the plaintiff in the sum of $5,000 for general damages for false arrest.

The evidence before the Court shows and I find as facts that in April this year, the defendant who is a businessman in Sydney, Australia, approached the plaintiff who is a planter at Lufilufi, Western Samoa for a consignment of taros to be shipped by the plaintiff to the defendant for the purpose of resale or retail in Sydney. At the discussions held between the plaintiff and the defendant at Lufilufi, the plaintiff agreed to ship a consignment of taros to the defendant at the price of AUD$28.00 per bag suggested by the defendant. The plaintiff also agreed upon request from the defendant

that the consignment was to be shipped on credit and payment would be made in 2 or 3 weeks time. The reason for that was because the defendant had just then started off his new business in Sydney. With the assistance of other taro suppliers of his village, Lufilufi, the plaintiff managed to come up with only 369 bags of taros. A fairly substantial amount but not enough to fill up a container. The taro was prepared in accordance with quarantine requirements and then transported to the wharf at Matautu-tai where they were packed in bags and put in a container. That container was then put on the vessel Fua Kavenga and shipped to Sydney. The permit under which the consignment was shipped was in the name of Peter Eteuati a brother of the defendant. That permit was sent by the defendant from Sydney to the plaintiff at Lufilufi. Peter Eteuati is unknown to the plaintiff and the plaintiff has never met him or dealt with him. According to the defendant his brother Peter Eteuati is also unemployed in Sydney. I am satisfied on the evidence and I find as a fact that the plaintiff was at all material times dealing with the defendant and not with Peter Eteuati. I am also satisfied and I find as a fact that the defendant was never acting as agent for Peter Eteuati in his dealing with the plaintiff. The name of Peter Eteuati on the permit is of no moment and is immaterial as it was really the defendant himself who had been dealing all along with the plaintiff. When the consignment arrived in Sydney on or about 5 May, the defendant called the plaintiff on the phone that the consignment had arrived and that a first payment of AUD$7,000 would be remitted in 2 or 3 weeks time. But when the container carrying the consignment was opened 2 days after arrival in Sydney inside a warehouse the taro was found to have gone dry and therefore unfit for human consumption. The defendant says that the director of the warehouse then dumped the whole consignment and he is contemplating taking legal action against the director of the warehouse for dumping the consignment. The defendant made no payment to the plaintiff for the consignment and did not advise the

plaintiff as to what had happened to the consignment until June when he came back to Western Samoa. The plaintiff made several phone calls to contact the defendant in Sydney but all were unsuccessful until the phone in Sydney sounded as if something had gone wrong with it. Then the defendant came back to Western Samoa about 29 May and in June he saw the plaintiff at Matautu-tai about this matter. The plaintiff threatened to shoot and assault the defendant. At a later date talks were held between the plaintiff and the defendant at Vailele but no resolution of this dispute was reached. Because no payment was made by the defendant for the consignment, the plaintiff has paid some of the suppliers who contributed taros to the consignment with his own money.

Dealing first with the plaintiff's claim, it is clear to me that what is involved in this case is a contract of sale of goods even though there was no suggestion at the hearing that this is a case of a contract of sale of goods. So the provisions of the Sale of Goods Act 1975 apply. Important questions as to passing of property and risk in the goods and who should bear the loss arise.

In trying to decide those questions the Court has been faced with a number of difficulties. The first difficulty goes to the nature of the relationship between the plaintiff and those suppliers who contributed taros to the consignment. It is not clear to the Court what was the nature of that relationship and whether it involved the passing of the property in the taros from the suppliers to the plaintiff so that the plaintiff can pass on property to the defendant or whether the suppliers still retained the property in their taros. Furthermore if the suppliers still retained the property in their taros then it is not clear what proportion of the consignment belonged to the suppliers and what proportion belonged to the plaintiff. These are questions which in my view are not clear from the evidence.

The next difficulty is that this is not simply a domestic contract of sale of goods. This is a contact for overseas sale of goods between a

seller in Western Samoa and a buyer in Australia and special rules apply to it. There is no evidence relating to the contract for carriage of the consignment of taros by sea. That is, there is no evidence to show whether the overseas sale in this case is a c.i.f or f.o.b contract or some other kind of carriage contract. I say this because for a contract for overseas sales of goods, the nature of the contract of carriage involved whether it is c.i.f or f.o.b or some other kind of carriage contract assists in determining the question relating to the passing of property and risk in the goods as between a seller and a buyer. For a discussion on overseas sales of goods see **Benjamin Sale of Goods, 2nd edition** which is the latest edition of that work available to the Court.

There is also the question relating to the examination and acceptance of the goods. Section 34(1) of the Act which relates to the buyer's right to examine the goods provides :

> "Where goods are delivered to the buyer, which he has not
> "previously examined, he is not deemed to have accepted them
> "unless and until he has had a reasonable opportunity of
> "examining them for the purpose of ascertaining whether they
> "are in conformity with the contract".

Then section 35 of the Act which relates to acceptance by the buyer provides :

> "The buyer is deemed to have accepted the goods when he
> "intimates to the seller that he has accepted them, or
> "when the goods have been delivered to him, and he does
> "any act in relation to them which is inconsistent with
> "the ownership of the seller, or when after the lapse
> "of a reasonable time he retains the goods, without
> "intimating to the seller that he has rejected them".

I have referred to these provisions although they were not raised at the hearing because the defendant in this case did not have the opportunity to examine the consignment of taros until the container was opened at a warehouse

in Sydney. And according to him and another witness called for the defendant, when the container carrying the consignment was opened the taro had gone dry and was therefore unfit for human consumption. If that is true, and there is no evidence to contradict that evidence for the defendant, then it is arguable that the seller was in breach of the implied condition provided either in section 15(a) or section 15(b) of the Act, or both. Section 15(a) essentially provides that in a contract of sale of goods, the goods will be reasonably fit for the purpose for which they are required. Section 15(b) essentially provides that in a sale of goods by description there is an implied condition that the goods will be of merchantable quality. So if the defendant is right, then it is arguable that the taros when they arrived in Sydney and examined and inspected by the defendant in the warehouse were either not reasonably fit for the purpose for which they were required and therefore in breach of the implied condition in section 15(a), or they were not of merchantable quality and therefore in breach of the implied condition in section 15(b), or both. As I have said there is no evidence to contradict the evidence for the defendant as to the condition of the consignment when it arrived in Sydney and was examined and inspected by the defendant.

Coming back to section 35 relating to acceptance, there is no evidence that the defendant had intimated to the plaintiff acceptance of the goods or that the defendant did anything in relation to the goods which was inconsistent with the plaintiff's ownership of the goods, that is, assuming that the plaintiff was owner of all the taros in the container and the suppliers who contributed in part of the consignment were not part owners. Although the defendant did call the plaintiff by phone when the consignment arrived in Sydney, it is not clear to me whether the defendant intimated to the plaintiff through that phone call that he was accepting the consignment. It is also not clear from the evidence whether the defendant had examined and inspected the consignment in terms of section 34 by the time he called the plaintiff on the phone. It also appears from the evidence that it was not

the defendant but the director of the warehouse who dumped the consignment. So it is difficult to say on the evidence that the defendant did any act in relation to the consignment which was inconsistent with the plaintiff's ownership of the consignment as it was not the defendant but someone else who dumped the consignment.

Perhaps the most relevant part of section 35 is where it says that if after a lapse of a reasonable time a buyer retains the goods without intimating to the seller that he has rejected them, then the buyer is deemed to have accepted them. In this case the consignment arrived in Sydney in early May and in June the defendant when he came to Western Samoa informed the plaintiff of what happened to the consignment. Whether that is a lapse of a reasonable time or not is not clear to the Court. I am in doubt on this point.

The onus of proof is on the plaintiff to prove his claim on the balance of possibilities. Because of the difficulties I have referred to, I am not satisfied on the required standard of proof that the plaintiff has discharged the onus on him. Accordingly the claim is dismissed.

As for the defendant's counterclaim in false arrest, I am of the view that the proper basis of the counterclaim should have been in the tort of malicious arrest. But even if the counterclaim was framed in malicious arrest, there is clearly insufficient evidence in this case to establish the tort of malicious arrest. The counterclaim is therefore also dismissed.

As both the claim and the counterclaim have been dismissed, there will be no order as to costs.

T F M Sapolu

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CHIEF JUSTICE