

IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

Sau + FB
AC 28 of 2015
[LA 22 of 2014]

AK
08/04/16

BETWEEN : 1. FILIPO TEMISI FAU
2. DEMSEY MURPHY FAU
- Appellants

AND : 1. SILILO FAU
2. MINISTER OF LANDS
- Respondents

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel : Mr. L. M. Niu SC for the Appellants
Mr. W. Edwards for the First Respondent
Mr. 'A. Kefu SC for the Second Respondent

Date of Hearing : 1 April 2016

Date of Judgment: 8 April 2016

JUDGMENT OF THE COURT

[1] This is an appeal by Filippo Fau and his son against a judgment of the Lord Chief Justice of 22 September 2015 dismissing their claim for relief against Sililo Fau and the Minister of Lands (the Minister) in proceedings filed in the Land Court in August 2014. The central issue in the appeal is the operation of s170 of the Land Act.

[2] Filippo is Sililo's older brother. Their grandfather Pataleone Fau died in 1982. Following his death their father, Peauafi Fau, was granted their grandfather's town allotment (*Lanutavake*) and a smaller share of their grandfather's tax allotment (*Tafasia*). Their uncle, Sosefo Fau, was granted a larger share of their grandfather's tax allotment (*Fononga Hihifo*). The two portions of the tax allotment were collectively known as *Fononga Hihifo mo Tafasia*. During his lifetime, Peauafi surrendered two portions of his tax allotment *Tafasia*. It had originally been 2 roods and 30.3 perches (approximately 2770 m²) in area and he was ultimately left, at the time of his death, with a small tax allotment of just 30 perches in area (approximately 750 m²).

[3] Peauafi died on 6 April 2001. The Lord Chief Justice made a number of findings about what occurred after Peauafi's death that were not challenged in this appeal. His Honour found that Filipino applied on 23 April 2001 for the town allotment *Lanutavake* as Peauafi's heir. This led to the registration of the town allotment in Filipino's name following approval by the Minister. His Honour also found the Minister did not approve Filipino's claim to *Fononga Hihifo mo Tafasia*. As is apparent already, a portion of this tax allotment, *Fononga Hihifo*, was not available for grant to Filipino as heir to his father's interests in land because that portion was registered in the name of his uncle, Sosefo. His Honour also found that the Minister made his decision not to grant Filipino *Tasafia* around 30 April 2001; and that Filipino was aware from about 30 April 2001 the Minister had made a decision not to grant his claim to *Tasafia*. This led the Lord Chief Justice later to conclude that Filipino was clearly on notice from 30 April 2001 that he would need to make some challenge for the land. This conclusion was not contested in the appeal.

[4] On 1 September 2008, Sililo applied for *Tafasia* as his town allotment apparently on the basis that it should be treated as

a town allotment given its comparatively small size at that time. The Lord Chief Justice found that the Minister then proceeded on the basis that the allotment had reverted to the estate holder and was available for grant. The estate holder consented to the application which was endorsed by the Minister and the deed of grant was issued to Sililo on 6 April 2009. The Lord Chief Justice noted that Filippo stated in his statement of claim that he became aware of Sililo's registration in September 2010.

[5] In the proceedings Filippo sought a declaration that the registration of the land as a town allotment under a deed of grant by the Minister to Filippo was unlawful, a consequential order that the deed be cancelled and an order that a deed of grant for the land in question be granted in favour of Filippo's son. This last order was intended to give effect to Filippo's interest in the allotment.

[6] In his reasons, the Lord Chief Justice expressed the view that the Minister had, in 2001, been under a duty to register Filippo as the holder of *Tafasia* and his decision not to do so had been unlawful. His Honour also said that *Tafasia* should

not have been treated by the Minister as having reverted to the estate holder under s87 because Filippo had lodged "a lawful and proper claim to the Minister for the land". However of decisive importance was the conclusion of the Lord Chief Justice that time began to run against Filippo for the purposes of making a claim to the land in dispute (*Tafasia*) in April 2001 and that, having regard to s170 of the Land Act, he had 10 years within which to make a claim but did not in fact do so until August 2014. Thus the Lord Chief Justice concluded Filippo and his son's action was "out of time and statute barred" which led to the order dismissing their claim.

[7] Section 170 provides:

No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

[8] The appellants' argument in the appeal was that under the succession provisions in s82 of the Land Act, Filippo as

Peauafi's eldest son, succeeded to Peauafi's interests in any town or tax allotment and he had a right to obtain those interests. Accordingly he could assert that right against his brother Sililo in relation to the interest that Sililo had acquired in 2009, and that the limitation period of 10 years in s170 began to run in 2009. That is to say, Filippo had 10 years from 2009 in which to make a claim against his brother and he was within time when, in 2014, these proceedings were commenced. The argument proceeded on the basis that the expression "such action" in the second part of s170 should be treated as comprehending the action against Sililo.

- [9] The critical issue is whether s170 operates in the limited way suggested by the appellants. The Land Act creates a comparatively complex legislative scheme for the creation and devolution of interests in land by grant and otherwise which includes important provisions concerning the succession to interests in land on the death of a person holding such an interest. Ownership and possession of land is of great importance in Tonga. The Act should be construed to the extent possible, in a way that creates certainty rather than uncertainty.

[10] The apparent intention of s 170 is twofold. The first is to afford a person a lengthy period to pursue a claim asserting, amongst other things, a right to or interest in land under the Land Act. However the second is to ensure certainty about, amongst other things, rights and interests under the Act after the expiration of that lengthy period.

[11] Limitation periods are prescribed in legislation in many jurisdictions and frequently in legislation specifically enacted for that purpose. Ultimately the effect of such provisions will turn on the proper construction of the legislation in question. Nonetheless, an illustration of the effect of a provision in the Limitation Act 1969 (NSW) is found in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1986 – 1987) 165 CLR 56 at 65 in which the High Court said that "..... such provisions will, at least in some circumstances, entail consequences which are substantive in that, by barring a remedy, they will effectively extinguish both rights and liabilities".

[12] In the present case, Filippo acquired rights to claim interests in two parcels of land in 2001. To obtain those interests by

grant required action by the Minister. Filippo became aware, at that time, that the Minister had made a decision not to grant him the tax allotment of *Tafasia*. It would have been open to Filippo to take legal action at this time to enforce his rights by proceedings against the Minister. It is true that it was not until 2009 that the interest he had in relation to the tax allotment of *Tafasia* derived from s 82 was, in substance, put beyond his reach by the grant to Sililo subject to any action he might then have taken against both the Minister and Sililo. But the substance of that action would have been, and in these proceedings is, to require the Minister to nullify the steps taken to confer an interest on Sililo as a step in a process of recognising Filippo's interest (conditional upon grant) acquired in 2001.

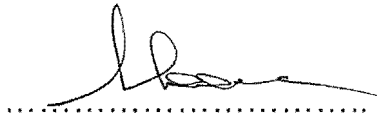
[13] In order to disturb Sililo's grant and have the Court order its cancellation he had to show that he had an interest' the Minister must recognize ie. one that remained enforceable against the Minister. Filippo is accordingly seeking to do indirectly by proceedings involving his brother as a defendant, that which he could have done directly in the 10 years following 2001, namely require in Court proceedings

the Minister to recognise and perfect by grant the interest he acquired in that year to the tax allotment of *Tafasia*.

[14] Section 170 serves the purpose, in this case, of creating certainty about the status of that tax allotment in relation to the interest of Filipino by denying him the opportunity in Court proceedings to continue to assert that interest which had arisen a decade earlier.

[15] It is desirable to mention, in conclusion, two judgments of this Court that the Lord Chief Justice considered were in conflict. One was *Minister of Lands v Kulitapa* [1997] Tonga LR 116 and the other was *Lisiate v Eli* [2012] Tonga LR 30. The latter did not refer to the former and the Lord Chief Justice, probably correctly, viewed the second decision as having been made *per incuriam* and declined to follow it. While the Court's conclusion in *Lisiate v Eli* about the basis upon which the limitation period did not apply may be doubted, it is unnecessary for us to engage in an analysis of both judgments as the answer to the question posed in this appeal is, in our opinion, clear.

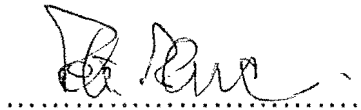
[16] For the preceding reasons, the appellants have failed to demonstrate any error on the part of the Lord Chief Justice. The appeal should be dismissed with costs. We so order.



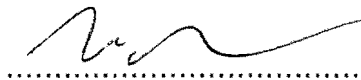
Moore J



Handley J



Blanchard J



Tupou J

