IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 22 of 2015

NUKU'ALOFA REGISTRY [CV 39 of 2014]

BETWEEN: YUZHEN YANG

- Appellant

AND : 1. 'OLIONI MANOA
2. MATELITA MANOA

- Respondents

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel: Mr. L. M. Niu SC for the Appellant
Mr. S. Fonua for the First Respondent
Mrs. P. Taufaeteau for the Second Respondent

Date of Hearing : 29 March 2016

Date of Judgment : 8 April 2016

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal from an interlocutory judgment of Scott J of 7 August 2015 given in the Supreme Court answering questions that had arisen in proceedings commenced by the appellant and another. Those questions raised an issue about the legality of an agreement concerning the occupation and use of a building. Scott J had earlier given a judgment, on 6 June 2014, in related proceedings involving the same parties in the Land Court concerning the jurisdiction of the Land Court.

The factual background

[2] The first respondent is the registered owner of a town allotment at Haveluloto Tohi 376 Folio 39 with an area of 759.6 m². The second respondent is his wife. He built, on the allotment, a retail shop measuring approximately 10' x 20' with a small room above it at the front part of his allotment abutting the street. He continued to live in his house on the allotment but operated a retail business from the shop and a taxi business from the room above.

[3] In 1998 he was approached by Meng Sen Tsay who wanted to rent the shop which by then had been extended. To that end, they executed a document entitled "Tenancy Agreement" on 29 June 1999. In terms, the agreement ran from 2 June 1999 to 1 June 2008. The word "premises" governed much of the operation of the agreement and was described in the following way: "The landlord is desirous of renting out a retail store at the frontage of land at Haveluloto opposite to Vaiola Hospital to the tenant for the purposes of retail store". The agreement identified the use that might be made of the premises by the tenant. It could not be used for any illegal purpose and the tenant could "not .... cause or permit a nuisance". The tenant was obliged to use the premises only for the purpose of a retail store. There was a clause dealing with alterations and additions to the premises which prevented the tenant from attaching any fixture or renovating, altering or adding to the premises unless he had the landlord's permission.

[4] In his reasons for judgment of 7 August 2015, Scott J said he was attaching a copy of his reasons for judgment of 6 June 2014 and indicated he would not repeat what was said in those reasons about "several aspects of the circumstances and law

which [were] relevant to the matter". His Honour was, in substance, incorporating by reference what he had said in the earlier judgment into his judgment of 7 August 2015. Much of the earlier judgment was a recitation of what the appellant and the first respondent had said in their affidavits. Some of what was said in those affidavits was probably not controversial though some appeared to be and reflected factual disputes that the court would need to resolve. However no findings of fact have been made by the trial judge accepting or rejecting either in whole or in part the affidavit evidence. Nonetheless we will refer to some of this evidence on the assumption that it is uncontroversial or that findings of fact will be made in due course.

[5] The trial judge recounted in his judgment of 6 June 2014, affidavit evidence of the first respondent that the appellant telephoned him in the United States, where he was apparently living, seeking his permission to build on top of the retail shops "for her own business as diners and restaurant". This appears to have happened and, in addition, the shop was enlarged by Meng Sen Tsay though precisely when these events occurred is not presently relevant. It also appears that for a period, the

appellant used and occupied the premises while paying rent to Meng Sen Tsay. That money was, in turn, paid to the respondents. On the appellant's affidavit evidence, this was because Meng Sen Tsay had sub-let the premises to her.

[6] By 2005, the relationship between the appellant and respondents concerning the use and occupation of the premises was more direct and in June 2005 they signed a document entitled "Tenancy Agreement" which, while expressed differently, appears to be to the same general effect as the agreement between the respondents and Meng Sen Tsay dated 29 June 1999. This agreement was for a term of 5 years from 9 June 2008 to 9 June 2013.

[7] Also in evidence was a further tenancy agreement dated 20 October 2007 ("the October 2007 tenancy agreement"). That agreement, in terms, ran from June 2013 to end in June 2023. There may be an issue about who signed this document but the document itself identifies the parties as the appellant and the respondents. It provided that the tenant had the right to transfer the tenancy to a third party during its currency. In her affidavit, the appellant said she sub-let the retail store and

accommodation facilities downstairs to Zhufu Wei and he moved in with his family, lived there and carried on his retail business there. There was documentary evidence that this arrangement was reflected in a sub-tenancy agreement entered into in June 2013 operating for a period of five years.

[8] The trial judge recounted that the first respondent said in his affidavit that he returned to Tonga in May 2010 and discovered that the appellant lived upstairs and there was no "diner or restaurant business" and that the appellant had let the downstairs as a retail shop to Zhufu Wei. The first respondent said that neither the appellant nor Zhufu Wei had a business license as required by the Business Licence Act 2002, their activities on the premises were accordingly illegal and also that the appellant used the premises for illegal gambling.

[9] Also when the first respondent returned to Tonga in 2010, a dispute arose between him and the appellant about money she allegedly owed him. Other issues arose concerning the occupancy of the premises. By June 2013 the relationships had deteriorated and the first respondent locked up the premises. In

the result, the appellant could not get upstairs and Zhufu Wei could not operate the shop. Police became involved.

[10] One fact noted by the trial judge in his judgment of 6 June 2014 was that the premises the subject of the dispute between the parties occupied one third of the land to which the first respondent had title.

The course of the litigation

[11] In June 2013, the appellant and Zhufu Wei commenced proceedings against the first and second respondents in the Land Court seeking interim injunctive relief, effectively restraining them from interfering with the conduct of the business on the premises including by locking the store. They also sought damages. This application was opposed by the respondents who raised in opposition, amongst other things, the illegality of the October 2007 tenancy agreement having regard to s13 of the Land Act.

[12] Those proceedings led to the judgment of 6 June 2014 in the Land Court in which Scott J held that he did not have, as a judge of the Land Court, jurisdiction to deal with the controversy.

[13] The proceedings were recommenced in the Supreme Court in June 2014. The second judgment of Scott J directly challenged in this appeal was given on 7 August 2015. With the consent of the parties, his Honour decided to try separately an issue which was described in his reasons as "the preliminary issue [of] the legality or effectiveness of an agreement dated 20 October 2007". In a concluding paragraph to those reasons entitled "Result", his Honour said "In my opinion the agreements reached between the parties herein were either illegal or ineffective or both". The way this conclusion was expressed indicates his Honour considered that the October 2007 tenancy agreement was illegal as well as ineffective but even if was not illegal it was nonetheless ineffective. The reason for this latter conclusion is not explained.

The status of buildings as chattels and s13

[14] Section 13 of the Land Act provides:

> *Unlawful agreements*
> *Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a*

fine not exceeding $200 or to imprisonment for any period not exceeding 12 months or both.

[15] The answer to the question of whether tenancy agreements or analogues of tenancy agreements required the approval of the Minister or Cabinet in certain circumstances and, if they have not been approved, whether such agreements are caught by s13 has emerged through Court decisions particularly in the last two decades.

[16] In our opinion, such agreements are not caught by s13 if they simply relate to the occupation and use of a building and its curtilage. This general statement would, of course, be subject to any specific and clear statutory exceptions. The foundation of this conclusion is the acceptance in Tongan law that buildings erected on land do not form part of the land and are chattels. Decisions of this Court recognising this status of buildings include *Kolo v Bank of Tonga* [1997] Tonga LR 181, *Mangisi v Koloamatangi* [1999] TOCA 9, *Cowley v Tourist Services Ha'pai Ltd and Fund Management Ltd* [2001] Tonga LR 183, *Niu v Takealava* [2013] Tonga LR 55 and *Westpac Bank of Tonga v Fonua* [2014] Tonga LR 94. In *Mangisi v Koloamatangi* this

Court said s13 did not apply to an agreement dealing with the occupation and use of a building. Though the Court spoke of "short term tenancy agreements", the duration of the agreement cannot have a decisive effect on its legal character for the purposes of s13.

[17] It is highly likely that there are many commercial arrangements now existing in Tonga that are based on the decisions of the Courts including the Court of Appeal about the status of buildings and agreements concerning their occupation and use. A fundamentally important feature of any legal system is the creation of certainty and predictability. It is for that reason that courts and, in particular, final courts of appeal should be slow to alter the direction of the development of the law or the law itself especially where people have relied upon what the Courts have said about property rights.

[18] Different considerations arise in relation the alteration of the law by Parliament. It has the capacity to ameliorate the effect of change through transitional and other provisions. This whole question of agreements authorising the use and occupation of a building and so called "tenancy agreements" more generally was

addressed in the 2012 report of the Royal Land Commission which also contained draft legislation. It is a matter for Parliament whether it wishes to act on those recommendations.

The effect of illegality on a contract

[19] Even if the trial judge had been right and the October 2007 tenancy agreement was illegal because of s13, it did not necessarily follow that it was unenforceable by the appellant. While it is not necessary to decide this issue in this appeal, it may be desirable to briefly explain why.

[20] It should be noted at the outset that s13 exposes the landholder to a criminal sanction for entering into an agreement of the prescribed type. It does not expose the other party to the criminal sanction. Accordingly it is necessary to ascertain whether, as a matter of statutory construction, s13 is intended to render the agreement illegal and unenforceable by both parties.

[21] A very similar situation was recently addressed by the High Court of Australia in *Gnych v Polish Club Limited* [2015] HCA 23. That case concerned the status of a lease of part of licenced premises as a restaurant where the grant of any such lease had

to be approved by a statutory authority that administered the gaming and liquor legislation. Specifically, the legislation prevented the grant of such a lease by the lessor without that approval. Approval for the lease had not been given and the lessor, a club, sought to avoid its obligations under the lease alleging the lease was illegal. The trial judge made orders enforcing the lease in favour of the lessee. Those orders were set aside by the Court of Appeal of New South Wales on the footing that the lease was illegal and unenforceable but the orders were reinstated by the High Court. In substance, the High Court concluded the lessee was entitled to enforce the lease even though it was illegal. The High Court made the following statements of general principle:

> [35] In *Equuscorp Pty Ltd v Haxton* French CJ, Crennan and Kiefel JJ explained that an agreement may be unenforceable for statutory illegality in three categories of case, where:
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> "(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
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> (ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;

(iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a 'contract associated with or in the furtherance of illegal purposes'.

In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable'." (footnotes omitted)

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[45] As a matter of legislative construction, the likelihood of adverse consequences for the "innocent party" to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language. And in the present case, this unattractive aspect of the Club's argument is compounded by the circumstance that, as its counsel acknowledged, the Club was obliged to take steps to seek the approval of the Authority for the grant of the lease and did not do.

[22] The law in England concerning the rights of a party where the statute only penalises the other party is to the same general

effect: Chitty on Contracts Vol 1, 29th edition (2004) at para 16 – 153.

[23] The last observations in *Gnych v Polish Club Ltd* would support a conclusion that a party to an agreement with a landholder which should not have been made because of s13, could nonetheless enforce the agreement against the landholder.

[24] Because these issues remained for determination even if the October 2007 tenancy agreement had been correctly determined by Scott J to be illegal, it was undesirable for his Honour to have raised and answered a separate and preliminary question which solely addressed illegality.

The determination of separate questions

[25] Order 25 rule 4 of the Supreme Court Rules authorises the Court to conduct a separate trial of a preliminary question. It is common for rules of court to contain such a provision. However it is necessary for judges to approach the decision whether to conduct a separate trial with considerable caution and be mindful of the fact that while such a procedure might, superficially, appear to provide a quick and short route to a final

resolution of litigation, it often does not. The trial of a separate question can have the effect of prolonging litigation and increasing the costs for the parties. The High Court of Australia said in *Bass v Perpetual Trustees Co Ltd* (1999) 198 CLR 334 at 357:

> Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state — let alone answer — preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred.

Conclusion

[26] For the preceding reasons, the appeal should succeed. The Court orders:

1. The appeal is allowed.

2. The Court answers the preliminary question:

Question: Does s13 of the Land Act apply to the October 2007 tenancy agreement?

Answer: No

3. The matter is remitted to the Supreme Court for trial of all issues.

4. The respondents pay the appellant's costs of the appeal.

5. The respondents pay the appellant's costs of the trial of the separate question in the Supreme Court.

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Moore J

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Handley J

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Blanchard J

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Tupou J