

IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION

NUKU'ALOFA REGISTRY

AC 17 of 2016

[LA 19 of 2015]

BETWEEN : 1. SIONE HAVILI MAILE
2. SIONE FOLIAKI 'AMANAKI
3. MO'UI FO'OU 'IA KALAI SI FELLOWSHIP

- Appellants

AND : SIASI TOKAIKOLO 'IA KALAI SI

- Respondent

Coram : Moore J
Blanchard J
Hansen J

Counsel : Mr. L. M. Niu SC for the Appellants
Mr. W. C. Edwards SC for the Respondent

Date of Hearing : 9 March 2017

Date of Judgment : 16 March 2017

JUDGMENT OF THE COURT

Introduction

- [1] The respondent (Tokaikolo) is a church, founded in Tonga in 1978, and registered in Tonga under the Charitable Trusts Act 1993. It has followers in Tonga, New Zealand, Australia and the United States. One of Tokaikolo's churches in Tonga is at Ha'ateiho. It was dedicated in 2003.
- [2] In July 2013 the first-named appellant (Sione Maile) established a new church, the third named appellant (Mo'ui Fo'ou). With the second-named appellant (Sione 'Amanaki) and others who followed him, he took possession of the church and other buildings at Ha'ateiho comprising the church itself, a residence, a hall and a school (together the church property). They remained in possession, using the church as their place of worship. Those members of the congregation who remained loyal to Tokaikolo worshipped at the house of one of their number.
- [3] Relying principally on statements made at the time by the leader of Tokaikolo, the appellants claim the church was

gifted to them. Alternatively, they say that, by virtue of the statements made and the conduct of Tokaikolo's representatives, an estoppel arises which would make it inequitable for Tokaikolo to assert its rights as owner. They resisted proceedings brought by Tokaikolo in the Land Court to regain possession of the church property.

- [4] In a Ruling given on 9 November 2016 the Lord President found against the appellants. He held there had been no gift and that there were no grounds for an estoppel or any other basis on which the appellants could assert a right to ownership or possession of the church property. He made a declaration that Tokaikolo is the lawful owner of and entitled to possession of the property; ordered Mo'ui Fo'ou and its associates to vacate the property; and ordered the Minister of Lands to register a lease of the property issued in 2012 in the name of Tokaikolo.

- [5] The appellants appeal against the Ruling.

Further background

The church is established

- [6] Tokaikolo was established by Senituli Koloï. On his death in 1980 Dr Liufau Saulala was ordained as First Minister and Leader. In 1994 his title changed to President.
- [7] Sione Maile joined Tokaikolo at an early stage. He was a Minister and became Secretary General, the most senior position in the church after the President. The responsibilities of the Secretary General under the Constitution include record-keeping and assisting the President in the management, safe-keeping and welfare of the church.
- [8] The Tokaikolo church at Ha'ateiho began when a small group began worshipping in a shelter at Sione Maile's town allotment there. In 1997 two leases of land were obtained from the government, each for a term of 50 years. Additional reclaimed land was later added, the leases cancelled and a new lease approved and issued. The lessee is Tokaikolo. The lease has yet to be registered.
- [9] Between 2000 and 2010 the land was progressively developed. The church itself was completed in 2003 together with an adjoining residence. A school building was opened in

2008, a hall in 2010. It is common ground that Sione Maile was, as the President said, “an organiser and a force behind mobilising resources and monies”. But the development was very much a collective effort. Members of the Ha’ateiho congregation made voluntary contributions supplemented by donations of labour, money and food by other branches of Tokaikolo.

The breakaway

[10] On 8 July 2013 Sione Maile abruptly resigned from Tokaikolo. Both he and Liufau Saulala were in Auckland, New Zealand at the time. Having assured Liufau Saulala on 5 July that he was committed to Tokaikolo, on 8 July Sione Maile submitted a letter of resignation from his position as Secretary General in order to move to ‘a New Life’ and to establish a fellowship called Mo’ui Fo’ou ‘Ia Kalaisi Fellowship (New Life Fellowship in Christ).

[11] The following Sunday, 14 July 2013, at the evening service at Ha’ateiho, Sione Maile’s son-in-law, Sosaia Tautalanoa, announced that Sione Maile and others (himself included) had left Tokaikolo and that the church building would now be

called Mo'ui Fo'ou Fellowship. He said anyone who did not wish to join Mo'ui Fo'ou would have to leave. In what the President called 'an act of pronounced symbolic significance' Sione 'Amanaki preached the sermon. He had been told of "the breakaway" the previous day. He joined Mo'ui Fo'ou, is the chairperson of its land committee and assumed occupation of the Minister's residence at Ha'ateiho.

[12] From 14 July 2013 the Ha'ateiho church and associated buildings were used by Mo'ui Fo'ou to the exclusion of those members of the congregation who wished to remain with Tokaikolo. Numbering over 40 or, we were told, something under half of the congregation at 14 July 2013, they have since worshipped at the home of one of their number. The President found they had left the church "peacefully but not voluntarily".

The alleged gift

[13] On 10 July 2013 Liufau Saulala spoke to a bible study of Tokaikolo at Auckland. (The Lord President rejected the evidence of a witness who claimed the address took place in Tonga on 14 July 2013). Liufau Saulala spoke at length about

the breakaway. His remarks were recorded and a transcript prepared. Those parts of relevance to the case are reproduced in the Lord President's judgment. The passage on which particular reliance is placed is set out below. The words which the President said he understood to be particularly relevant to Mo'ui Fo'ou's defence are highlighted.

*"It is now clear brethren, that some members are breaking away from us. **If Sione should come for something that Tokaikolo has any claim to, I will tell Sione to take it with him. Not only that, Ha'ateiho was built by Sione Maile alone. That's the only chapel that did not have a loan. He's the servant of the Lord. Whilst we pay off these other loans. **If Sione should come for something that Tokaikolo has a claim to, I'll sign for whatever it is to be given to Sione. All of it.** About their little school, Lavengamalie is always ready to offer it any help it may need, because it's a good school. It emphasizes The Word of God. It is God's hand. Let's leave this other matter aside. **We will help them out, dear brethren. Whatever it is. We won't fight over any worldly goods**".***

- [14] The President unhesitatingly accepted the evidence of Liufau Saulala that he did not intend to convey by what he said that he was giving the church property at Ha'ateiho to Sione Maile or anyone else. Liufau Saulala had explained in evidence that

Sione Maile's resignation had come as a shock. It followed a period of tension in the church community. There had been disparaging remarks made publicly that focussed on Liufau Saulala. In what the President described as convincing evidence Liufau Saulala said he saw it as his obligation to pacify members of the Tokaikolo congregation and to remember the good work of Sione Maile and his followers. As the President said, this is supported by passages in the transcript. At one point Liufau Saulala said;

"I don't want you to be angry at those joining the breakaway. Because there are some who just go, this one family told me, the reason why, Sione called us to follow him, because we owe Sione a lot. Similarly, a lot of people owe Sione a lot of things, they owe him their status of being a pastor, bible study, healing and other material assistance, and it tells us, and I tell them it's all right, don't be angry at them".

[15] Liufau Saulala also made the point in his evidence that he did not believe the Ha'ateiho property was his to give away even if he wanted to.

[16] The President found there was nothing to show Sione Maile knew of what Liufau Saulala had said when the decision was made to take possession of the church at Ha'ateiho. Sione Maile did not give evidence, an omission the President said assumes significance given the onus on the defence to establish estoppel and numerous gaps in the evidence particularly as to Sione Maile's knowledge, belief and intention at relevant times. The only witness whose evidence could have provided some support for a finding that Sione Maile knew of what had been said at the bible study when the church property was taken over was found to be not a credible witness.

Subsequent events

[17] On 18 October 2013, Sione Maile wrote to the Minister of Lands. He asked for the existing lease to be cancelled and a new lease granted to Mo'ui Fo'ou. He said he had formed the Fellowship on 7 July 2013. He claimed that the improvements to the land had been "done solely by myself" and asked that the lease be registered to the Fellowship "as this is the

church building where those who have left Tokaikolo in Tonga meet.”

[18] The President noted that Sione Maile did not say the church property had been gifted to him or the Fellowship. Nor had he sought to obtain the consent of Tokaikolo to his application. The President described this as “strong evidence” that Sione Maile did not believe the church property had been gifted at all. He saw it as a “notable feature” of their case that Sione Maile and Mo’ui Fo’ou did not claim the property had been gifted until after recovery proceedings were issued.

[19] Between May 2014 and June 2015 Mo’ui Fo’ou did work on the property. The church and the minister’s residence were repainted in the colours of Mo’ui Fo’ou, the signage of the church was changed and the school playground filled and sealed. The cost of these works was some \$35,000. A further \$100,000 was spent extending the school onto adjoining land.

[20] There was no evidence that Tokaikolo was consulted about the works or knew of plans to undertake them. The President

rejected a submission that the Mo'ui Fo'ou defendants were encouraged to undertake the works by letters sent by Tokaikolo in January 2014 in response to letters of resignation from Ministers who had followed Sione Maile to Mo'ui Fo'ou. The letters wished them "all the best in the works that you are now doing". The President accepted the reference to "works" was to spiritual work and the good wishes simply good manners. In any event, the President pointed out the letters could not have been intended or taken as encouragement for work that did not commence until months later.

[21] Late in 2014 Tokaikolo resolved to take legal action. The President accepted that it did not act sooner because it wanted time to pass to allow emotions to cool and in the hope that those who left would return. A letter demanding return of the property was sent in January 2015. The demand was rejected. Proceedings were issued in June 2015. In November 2015 representative of the two churches met. The Mo'ui Fo'ou representatives apologised and asked to be gifted the church property. That approach was also seen by

the Judge as inconsistent with a belief that the property had been gifted. The request was declined.

Gift

[22] The appellants case is that on 10 July 2013 Liufau Saulala gifted “the physical property situated on the land” and the right to claim to lease the land. The gift is said to have been complete when Sione Maile “accepted the gift and took possession of the properties gifted” on 14 or 18 July 2013.

[23] It is convenient to begin our consideration of this aspect of the appeal, by identifying the essential elements of a gift as the President did, by reference to the following passage from Garrow and Fenton’s *Law of Personal Property in New Zealand* Vol 1, 7th ed at 4.3 and 4.4:

(a) *The donor and donee are both competent to give and receive what is intended;*

(b) *The donor actually intends to gift the immediate ownership of the property or, where the legal title is retained, to relinquish immediately the beneficial ownership in favour of the donee;*

- (c) *An act or acts adequate to give complete effect to that intention. An attempt to gift property which is not in existence or does not belong to the donor cannot operate as a complete gift and is unenforceable in the absence of consideration; and*
- (d) *Acceptance of the gift by the donee, which will be presumed subject to the donee's right to disclaim the property when he or she has knowledge of the gift.*

[24] The President found that the appellants had failed to establish the first three elements. In particular:

- (a) Liufau Saulala had no authority to gift the Ha'ateiho property.
- (b) There was no intention to gift the property.
- (c) There was no act sufficient to complete a gift of the property.

All findings were challenged on appeal. It is convenient to consider each separately.

Authority

[25] The President found that the right to obtain a registered lease of the land is a mere expectancy that cannot be the

subject of a lease. Mr Niu SC argues there is an equitable interest which can be gifted. We do not need to resolve that as the President's finding that Liufau Saulala did not have the authority to gift the property or Tokaikolo's interest in the lease presents a much more formidable obstacle. The Constitution and Bylaws (the Constitution) of Tokaikolo makes detailed provision for the governance of the church. There were two Constitutions in evidence, one dated 2004, the other 2007. As the President understood a challenge was mounted to the later one, he referred to both. The relevant provisions are not materially different anyway. We agree with the Lord President that neither can be understood as conferring on the President power to give away church property. We do not understand that finding to be challenged on appeal. Mr. Niu's argument, which was also mounted in the Court below, is that Liufau Saulala had been given general authority to dispose of property as he saw fit. This was said to be implied from the way he had been allowed to conduct himself in the past and what he himself asserted at the bible study meeting.

[26] The President emphatically rejected the submission. He held that the evidence "did not go close" to establishing that Liufau Saulala had or was held out as having such authority. We were not referred to anything in argument that might cause us to doubt the President's conclusion. Even if, as the appellants contend, Liufau Saulala was allowed considerable latitude in conducting financial transactions on behalf of Tokaikolo, we were not referred to any evidence which would support an inference that he had general authority to do as he pleased with church property. We agree also with the President that Liufau Saulala could hardly confer authority on himself by what he said at the bible study.

Intention

[28] There was nothing said in argument to bring into question the President's finding that in saying what he did at the bible study Liufau Saulala evinced an intention to give away the Ha'ateiho church property. It is easy to understand why, faced with an audience that was unsettled and possibly angered by recent developments, he should seek to calm the

situation and speak generously of Sione Maile's contributions.

[29] Mr. Niu asked us to have regard to the evidence of one of those present who recalled Liufau Saulala saying "to willingly let Sione go with all his workings because all his workings belonged to him wholly and was his individually undertaking." He also referred to Liufau Saulala's evidence that he told the meeting: "Sione Maile can leave the church and take with him what he has done." In each case Mr. Niu is relying on the witnesses' paraphrase of what was said. With a verbatim transcript of what was actually said available, there is no profit in considering what one member of the audience took away from the meeting or Liufau Saulala's attempt in his evidence to capture what he was endeavouring to convey. What he actually said speaks for itself.

Delivery

[30] A gift, other than a gift by deed, must be accompanied by delivery. Words alone are not enough. As *Windeyer J* said in *Olsson v Dyson* (1969) 120 CLR 365, 380:

"[The owner of a thing] must not only say it is a gift, he must give it to the donee, who must, by words or conduct, accept."

As Windeyer J goes on to say, how a thing can be given away depends on what it is. In the case of a building, the handing over of a key or something similar could be expected. Obviously, there was nothing of that nature. Sione Maile's followers simply took possession. There was no action on behalf of Tokaikolo that could be understood to constitute delivery.

[31] The Lord President's finding that there was no gift is unassailable.

Estoppel

[32] In the Land Court the defence of estoppel was argued on two distinct bases. First, s.103 (2) and (3) of the Evidence Act 1993 was relied on. Alternatively the Lord President was asked to consider the application of estoppel by acquiescence.

Evidence Act

[33] Section 103 (2) and (3) of the Evidence Act provides:

(2) *If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of fact.*

(3) *If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.*

Section 103 (2)

[34] Unsurprisingly, given his earlier findings, the President found the elements of a defence under s103 (2) had not been established. The representation relied on by the appellants is,

as pleaded, a declaration by Liufau Saulala that Sione Maile “could leave and that he (Sione Maile) take with him the works he had done for the church”. It was put somewhat differently in argument before the Land Court as a representation that Mo’ui Fo’ou could occupy and use the Ha’ateiho church property as its own and Tokaikolo would not seek its return.

[35] Whatever the precise formulation of the representation, it is not supported by the transcript itself as the President pointed out. What Liufau Saulala said twice in his course of his address is: “If Sione should come for something.....” he can have it. As the President said, that is not a representation as to a state of facts. At best it is a statement of future intention.

[36] However Liufau Saulala’s words are characterised, what cannot be disputed, given the President’s findings of fact, is that he did not intend Sione Maile or anyone else to act on his words and take possession of the church property. Nor on the facts as found, is there evidence that, in occupying the church property, Sione Maile acted on the words of Liufau Saulala.

Section 103(3)

[37] Section 103(3) requires conduct that would be taken by a reasonable person to mean a representation of fact. The conduct relied on (in submissions, it was not pleaded) was Tokaikolo's "peaceful departure" from the property; the lack of any objection to the work Mo'ui Fo'ou did and its increasing the number of pupils and teachers at the school; standing by for 18 months while Mo'ui Fo'ui treated the property as its own; and the tenor of its correspondence with the Ministers who resigned. These circumstances were submitted to mean that "the works at Ha'ateiho were to be [the appellants] forthwith". It appears that by "works" was meant all improvements to the land.

[38] The President found the conduct relied on could not have been understood and acted on by Mo'ui Fo'ou in the way contended. He pointed out that while the departure from the church was peaceful, it was not voluntary. Mo'ui Fo'ou had no reason to think it was entitled to take possession. There was no evidence Tokaikolo was aware of the planned works

or of what was going on at the school. Further, while works were underway Tokaikolo gave clear notice it wanted the property back.

[39] Before us, as he had in the lower Court, Mr. Niu argued that if Tokaikolo had not intended its conduct to encourage Mo'ui Fo'ou in the belief there was agreement to its taking possession of the property, it would have immediately objected. But as the President said, that overlooks Tokaikolo's view that the better course was to let emotions cool in the hope that some who had left Tokaikolo would return. Moreover, as the President also pointed out, Mo'ui Fo'ou was well aware from what was said by one leading member of the congregation that the takeover was objected to.

[40] We agree with the President that the conduct of Mo'ui Fo'ou is inconsistent with a belief that Tokaikolo intended it to remain in possession of the property. As previously noted, Sione Maile and Mo'ui Fo'ou at no stage asserted that they understood Tokaikolo had surrendered its right of ownership. Sione Maile made no such claim when asking for a new lease

to be granted to Mo'ui Fo'ou. And when, in January 2015, Tokaikolo make demand for the return of the property, again there was no claim of a right to remain in occupation. The apology and request for the property to be given to the Mo'ui Fo'ou in November 2015 speaks for itself.

Estoppel by acquiescence

[41] Estoppel by acquiescence or proprietary estoppel as it is sometimes called, is to be distinguished from estoppel under s103 of the Evidence Act which may be seen as an evidential rule that prevents a person denying what he or she has by words or conduct asserted. In contrast, estoppel by acquiescence is a means by which property rights may be affected or created. It has been recognised and applied in a number of Tongan cases – see for example *Tafolo v Vete* (1998) Tonga LR 164 (CA), *Ongolea v Finau* (2003) Tonga LR 152, *Vea v Filipe* (2009) Tonga LR 293, *Li v Finefeuiaki* (2013) Tonga LR 39.

[42] The doctrine gives the Court a wide discretion to grant relief when an owner of land (a) induces, encourages or allows the

claimant to believe that he or she has or will enjoy some right or benefit over the land, (b) the claimant acts to his or her detriment to the knowledge of the owner and (c) the owner then seeks to take unconscionable advantage of the situation by denying the claimant the expected right or benefit.

[43] It will be apparent that a claim for relief on this basis is doomed to fail for essentially the same reasons as those under the s103 of the Evidence Act. The appellants have been unable to show that they were induced, encouraged or allowed by Tokaikolo to believe that they had or would enjoy a right or benefit over the land. Certainly, they expended money on the property, although most of it seems to have been for maintenance and little for improvements except on the adjoining land. Whatever its purpose, it was not undertaken with the knowledge or approval of Tokaikolo. The element of unconscionability is necessarily absent.

[44] The Lord President observed that Tokaikolo could perhaps be criticised for failing to reclaim the property earlier. But, as he says, that would have made no difference. When put on

notice of Tokaikolo's intention to reclaim the land Mo'ui Fo'ou rejected the demand and continued with the works.

Result

[45] All grounds of appeal having failed, the appeal is dismissed. The appellant is to pay costs in this Court to be taxed if not agreed.



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Moore J

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Blanchard J

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Hansen J