IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 15 of 2016

NUKU'ALOFA REGISTRY [CV 39 of 2014]

BETWEEN: YUZHEN YANG

- Appellant

AND : 1. 'OLIONI MANOA
2. MATELITA MANOA

- Respondents

Coram : Moore J
Blanchard J
Hansen 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 : 9 March 2017

Date of Judgment : 16 March 2017

JUDGMENT OF THE COURT

The Facts

[1] Mrs. Yang appeals against a decision of Scott J in the Supreme Court refusing her claim for specific performance of a tenancy agreement dated 20 October 2007 relating to a commercial building at Haveluloto. Although executed in 2007, the agreement was for a term of 10 years commencing on 9 June 2013. The rental was to be TOP $35,000 payable in a lump sum in advance (in October 2007).

(a) The 1999 Agreement

[2] This unusual arrangement reflected prior dealings which it is necessary to describe. The respondent, 'Olioni Manoa, had a town allotment at Haveluloto on which he had erected a retail store and, behind it, his residence. On 29 June 1999 'Olioni as landlord rented to Meng Sen Tsay his "retail store" opposite Vaiola Hospital. The term of that 1999 tenancy was 9 years from 2 June 1999 until 1 June 2008. The rent for the first 5 years was set at $400 per month but it appears to have been decreased by subsequent informal agreement as there were in evidence receipts of rent at the rate of $3000 for the years 2001 and 2003.

The tenancy was for a "retail store" only. There was a provision preventing the tenant, without the landlord's permission, from removing any fixture attached by the tenant. Importantly, there was no provision that prevented the tenant from assigning or sub-letting the tenancy. The 1999 agreement was personally signed by 'Olioni Manoa. He had the benefit of legal advice before signing.

(b) The 2005 agreement

[3] By 2005 'Olioni was living in Hawaii and Mrs. Yang had become Mr. Tsay's sub-tenant and was running the store. She approached 'Olioni by telephone with a proposal that she should build an upper storey above the store but she wanted to have a new tenancy to take effect from when Tsay's tenancy expired in 2008. A brief tenancy agreement was prepared and signed on 9 June 2005 by Mrs. Yang and by 'Olioni's wife Matelita Manoa. It was expressed to be with 'Olioni and Matelita, who had been given general authority from 'Olioni to sign any document for him while he was out of Tonga. (Despite the introduction of Matelita as a party, in all the agreements the landlord continues to be referred to as "he"). There was no clearly expressed mention in the 2005 agreement of the proposed upper storey. The subject-

matter was ambiguously described as "the premises at his ['Olioni's] residential place at Haveluloto, Tongatapu". But it has never been in dispute that Mrs. Yang was authorised by 'Olioni to construct the upper storey.

[4] The 2005 agreement was for 5 years starting on 9 June 2008 at a rental of TOP$16,500 payable in advance. There was again no prohibition on assignment or sub-letting by Mrs. Yang. In fact there was an express agreement by the landlord that the tenant had "the right and freedom to transfer [the] tenancy to a third party during the term of the tenancy". She could have done that anyway in the absence of a prohibition. There was no longer a restriction on the use that might be made of the premises, probably because it was known to both parties that Mrs. Yang was proposing to use the upper floor as a restaurant. There was also an agreement by the landlord that he would not terminate the agreement during the tenancy without paying "the losses of the tenant, such as the expenses of the improvement and repair of the building". That must have been directed to the upper storey works that had been agreed upon. There was also a clumsily worded clause (later repeated in the 2007 agreement) saying that "the landlord agrees to attach any fixture or

renovated, alter or add to the premises to 230 square metres" (sic). It is likely that was supposed to mean that the landlord agreed to the attachment etc. of an extra area (the upper storey) to bring the total area of the premises to 230 square metres.

[5] By 2007 Mrs. Yang had constructed an upper floor above the retail store. It seems never to have been used as a restaurant. It was in fact used for residential proposes and latterly only for storage.

(c) The 2007 agreement

[6] We can move now to the 2007 agreement. There were actually two versions of this, one signed on 20 October and a replacement, identical in all respects except for the correction of a mistake in a figure, signed on 29 October. However, it bears the original date of 20 October 2007. It is the latter agreement of which specific performance is sought. The 2007 agreement provides for a further advance rent of TOP $35,000, payment of which was to be made "right away immediately after the agreement is signed". The respondents say that in fact Mrs. Yang paid Matelita only TOP$19,000, purporting to deduct (by way of a claimed set-off) TOP$16,000 which Mrs. Yang said

Matelita owed her for goods supplied on credit. Scott J dismissed a counterclaim for the TOP$16,000 by the respondents because it was statute barred.

[7] The term of the 2007 agreement is 10 years from 9 June 2013, ie, from when the 2005 agreement would expire. There was again no restriction on user or prohibition of assignment or subletting.

[8] There was, however, a new covenant by the landlord that "he will not terminate this agreement during the period of the tenancy otherwise he will pay the Tenant the amount of $170,000" (which sum had been misstated as TOP$117,000 in the agreement signed on 20 October). The TOP$170,000 was intended to reflect the amount spent by Mrs. Yang in constructing the upper storey. (She now says it cost much more than that but has not provided any proof of actual expenditure).

[9] The 2007 agreement was again signed for 'Olioni and Matelita by Matelita. There is in the evidence a document of some significance to which Scott J made no reference. It is in Tongan (so plainly not drafted by Mrs. Yang) but we were supplied with a

translation to which no objection was taken. It is from a Californian address and is addressed to the Registrar of the "Nuku'alofa Court" and is signed by 'Olioni. He asks for the Registrar to "legalise this letter" and says:

> 1. *I authorise my lawful wife Matelita Manoa to have the same authority that I Olioni Manoa have for any legal matter relating to my town allotment situated at Haveluloto in the estate of Noble Fielakepa.*
>
> 2. *I also authorise Matelita Manoa to carry out any legal matter relating to my store which I built on it and which is rented by a Chinese couple if they wish to continue the renting of my store for some years all authority are given to Matelita Manoa to carry out the legal matters whilst I am away from Tongatapu.*

(d) A sublease by Mrs. Yang

[10] On 1 June 2009 Mrs. Yang sublet the ground floor retail store to Zhufu Wei at a rent of TOP$2600 per month, which was retrospectively adjusted down to TOP$2000 per month when no liquor license could be obtained for the store.

(e) Subsequent events

[11] After 'Olioni returned from the USA in 2010 he realised that Mrs. Yang had allowed Zhufu Wei to operate the store. He raised objection and sought to bring the arrangements made with Mrs.

Yang to an end. In June 2013 'Olioni boarded up the shop and had the water supply to the building disconnected. Mrs. Yang obtained an interim injunction requiring access and services to be restored. She brought an action for specific performance of the 2007 agreement in the Supreme Court in June 2014. Scott J tried a separate issue of whether the 2007 agreement offended against s.13 of the Land Act. He found that the agreement was illegal on that account but his decision was reversed on appeal to this Court: *Yang v Manoa* AC 22 of 2015.

The Supreme Court judgment

[12] The matter therefore came back before Scott J for full trial. In his judgment delivered on 14 October 2016 the Judge went through the various tenancy agreements. He particularly drew attention to the fact that whereas the rent in 1999 had been $400 per month, the payments of $16,500 and $35,000 in advance provided for in the 2005 and 2007 agreements worked out at $275 per month and $291.60 per month respectively for the 5 and 10 year terms.

(a) The oral evidence

[13] Scott J summarised the evidence given orally before him (and we of course take into account the advantage he enjoyed in seeing

and hearing the witnesses). Mrs. Yang testified that prior to the 2005 agreement being signed she had spoken to 'Olioni by telephone and reached agreement with him. She had again telephoned him before the 2007 agreement was prepared and had got his consent to the building upstairs (although other evidence was that it already been completed). The 2005 and 2007 agreements had been prepared by her lawyer. She had given the 2007 agreement to Matelita and met her 3 or 4 days later in the presence of an engineer who acted as a witness. She accepted that she had deducted TOP$16,000 from the 2007 payment saying that was because of money owed for goods bought on credit from her shop. She said the building work was begun in 2006 and completed in 2007.

[14] The Judge recorded that it was put to Mrs. Yang that the 2005 and 2007 agreements related to the upper storey only and not to the ground floor. She emphatically denied this. She conceded that she could not read or understand English (though we interpolate that she must have had some degree of ability to hold a conversation in English as she did have telephone discussions with 'Olioni on several occasions, as he accepted). Mrs. Yang said she did not know how much English Matelita understood.

[15] Mrs. Yang's son gave evidence. He had been running the store in 2007 and was responsible for instructing the lawyer who prepared the agreement. He had taken it to his mother and Matelita and explained it. Both had said it was OK and signed it. Matelita had seen the agreement for the first time on 20 October.

[16] 'Olioni confirmed that Mrs. Yang had indeed rung him in the United States in 2005 and "asked for permission to use the upstairs of the building to make a restaurant". He had agreed but he asserted that he had "clarified that the first floor would belong to Mrs. Yang and Matelita but the ground floor would belong to myself and Tsay". He had let Mrs. Yang negotiate with Matelita as the money for upstairs would go to her and their children. The agreement would be similar to the agreement with Tsay. Mrs. Yang had telephoned again in 2008 and asked for the agreement to be extended till 2013 "but for the ground floor to be under Tsay". He said he agreed. He accepted he had negotiated with Mrs. Yang about the 20 October agreement. "She rang me about renting the upstairs because she had completed the construction". He said he agreed with her and sent the letter of authorisation.

[17] 'Olioni also stated that he did not know that Mrs. Yang was subletting from Tsay. Tsay had stopped paying rent in 2003 but 'Olioni did not know this until 2010 because Matelita did not tell him. Tsay had refused to pay anything. He had trusted Mrs. Yang and it was not until 2010 that he found out that the new agreement was not the same as the one he had with Tsay. He did not know the 2007 agreement was to run till 2023. He too could not read or understand English (but obviously could speak it well enough to have a conversation with Mrs. Yang).

[18] Matelita's evidence was that Mrs Yang had come to her in 2005 and asked if she could construct upstairs. She had called 'Olioni and he had said the agreement with Mrs. Yang was to be the same as the Tsay agreement. Matelita said construction of the upper floor finished in 2006. She said the 2007 agreements had been reached between 'Olioni and Mrs. Yang. Matelita also said that she did speak and read a little English but the agreements had not been explained to her. In cross-examination, however, Matelita admitted she had read and understood the 2005 agreement but she said it had concerned the upstairs only. She described Mrs. Yang as like a mother to her. She had trusted

Mrs. Yang about the payment of the money and had at first not counted it, only discovering later there was only TOP$19,000.

(b) The Judge's conclusions

[19] Scott J said that it was plain to him that over several years Mrs. Yang and her son significantly improved their position in relation to the Manoas to the detriment of the latter and without their being aware of it. What had started off as a simple non-transferrable licence to operate a small shop, which could not be altered or added to, ended up as a right to occupy premises now at least twice as large, and to use the premises for any business and to transfer it to a third party. The original rent of $400 per month had shrunk to $291.60 per month until 2023. Scott J said it was "not in dispute" that neither Mrs. Yang nor 'Olioni understood English to a sufficient extent to be able to comprehend the documents. Having heard Mrs. Yang's attempt to recreate her telephone conversation with 'Olioni in 2005, the Judge was satisfied that "it was simply not possible for them to reach any sufficient degree of agreement". The 2007 documents were prepared by her lawyer. Matelita was only given her copy on the day of signature. 'Olioni had not seen them till 2010.

[20] The Judge found that Mrs. Yang knew what the agreements contained. But 'Olioni was genuine in his understanding that the agreements only related to the upper storey. The proposed restaurant was quite a different business from a supermarket. To have a separate agreement for each storey was entirely reasonable. Matelita had seen her only duty to be to sign the agreements on behalf of the landholder, 'Olioni, not to examine them and assess their worth. Scott J commented that he could find nothing in the 2007 agreement either permitting or denying Mrs. Yang the right to remove the building at the end of the tenancy. The form of the agreement was unsatisfactory. To be fair to and binding on the parties this type of agreement should be drawn up in proper and adequate form, should be properly understood by both parties and should be the subject of independent legal advice. "All these fundamentals were missing in this case and in my opinion it would be unconscionable to uphold these agreements". He declined to order specific performance.

Submissions

[21] For Mrs. Yang, Mr. Niu submitted to us (a) that the 2007 agreement covered both floors of the building and (b) that it was

not an unconscionable agreement. He said that Scott J had not properly analysed the overall fairness of the bargain that had actually been made, taking into particular account Mrs. Yang's expenditure on the upper floor. The respondents' submissions relied very much on the judgment of Scott J and contended that it should be upheld.

Our view

[22] We consider that Mr. Niu's criticisms are well made. When the 2007 agreement is considered against the history of the prior agreements and the construction by Mrs. Yang of the upper storey, it is plain that the subject matter of that agreement (and indeed the 2005 agreement) must have been the whole of the building. We say this both because of the language of the agreement and of the written authority given by 'Olioni to Matelita and because the economics of the transaction simply would not make sense if all Mrs. Yang was getting for her expenditure of at least TOP$170,000 plus TOP$35,000 = TOP$205,000 was a tenancy of the upper floor.

(a) The subject-matter of the tenancy

[23] We have concluded for three reasons that Scott J was wrong to find that the 2007 agreement was for the upper floor only or that 'Olioni and Matelita had a mistaken belief that was so. In our view the agreement was for the whole of the building and 'Olioni and Matelita must have known that.

[24] Firstly, if 'Olioni's claim that Mrs. Yang was leasing only the upper floor were correct one might have expected him to require that there be in existence a separate written agreement for the ground floor, and payment of a separate rental, after Tsay's tenancy ended in 2008, especially since on his account, the ground floor was to "belong" to him and Tsay (and the upper floor to Matelita and Mrs. Yang). Surely 'Olioni would have taken steps to get a new lease of the ground floor in place. And he would not have expected it to be with Tsay who had, 'Olioni complained, ceased paying rent in 2003. The only tenant with whom he was dealing was Mrs. Yang and he did not ask her for a separate agreement for the ground floor. Furthermore, it seems to have been only in 2013 that a claim was first made that the tenancy did not relate to the ground floor. By that time the parties had fallen out.

[25] Secondly, although the description of the subject-matter of the 2007 agreement is unhelpful ("premises at his residential place"), when 'Olioni gave Matelita the authority to sign on his behalf in 2007, he expressed it in terms of "my store which I built" (ie, the ground floor) and referred to the continuing renting "of my store". So the authorisation related to the store as well as to the upper storey that 'Olioni admits he had agreed on with Mrs. Yang. They had previously in 2005 agreed she would build it and now she was to have a new tenancy. The authorisation shows that it was to be a tenancy of more than just the upper floor.

[26] Thirdly, it would have been obvious that Mrs. Yang was wanting a tenancy that gave her a prospect of recovering over time her expenditure on the upper floor of TOP$170,000 plus the rent of TOP$35,000. We are handicapped by having no evidence about rental values in 2007 but it seems highly unlikely that the value to a tenant of occupation of the upper floor only over a period of 10 years (or even the 17 years from 2006 to 2023) would make the upfront expenditure by Mrs. Yang an economic proposition. She would not recover her expenditure. In this connection we should say that we disagree with Scott J's opinion that there was nothing in the document to stop Mrs. Yang removing the upper storey at

the end of the tenancy in 2023. And even if she had that inclination and ability she would hardly recover much of her investment by so doing. (The ground floor was not removable as it had been constructed by 'Olioni and/or Tsay and was not a tenant's fixture of Mrs. Yang.) But in fact the clear import of the compensation clause in the agreement is that it is only if the tenancy is terminated early that the tenant has rights to the building and a claim to receive anything by way of compensation because they have been disturbed. After the expiry of the tenancy in 2023 the respondents will be the absolute owners of the whole of the building including the upper storey.

[27] For these reasons we are satisfied that the 2005 and 2007 agreements related to both floors of the building and that 'Olioni and Matelita were under no misapprehension about that. On that basis, was the agreement unconscionable?

(b) Unconscionable conduct – the law

[28] A transaction may be unconscionable when one of the parties is suffering from a disability (sometimes called a special disadvantage), such as mental or physical infirmity, intoxication, dullness of intellect, inability to read a document or speak a

language, financial stringency, lack of education or absence of independent legal advice. Where that disability exists and affects the understanding of that party, and the other party knows or ought to know of it and takes advantage of it, the Court may set aside the transaction or decline to enforce it. Tipping J recently summarised the position for the New Zealand Supreme Court in *Gustav & Co. Ltd v Macfield Ltd* [2008] 2 NZLR 735 at [6]:

> *"Equity will intervene, when one party in entering into a transaction, unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware that the weaker party is unable adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances. The remedy is conscience-based and, in qualifying cases, the court intervenes and says that the stronger party may not take advantage of the rights acquired under the transaction because it would be contrary to good conscience to do so. The conscience of the stronger party must be so affected that equity will restrain that party from exercising its rights at law".*

[29] A transaction is not, however, unconscionable simply because a party has made a poor bargain or just because there is an inequality of bargaining power. The disabling condition must

seriously affect the ability of the affected party to make a judgment as to his or her best interests: *Moehau v Westpac Bank of Tonga* [2013] Tonga LR 71 at [27], citing *The Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (HCA) at 474 and *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (HCA) at [5] – [14].

[30] Inadequacy of consideration never of itself renders a transaction unconscionable but it is often a specially important element where circumstances may have placed a party at a disadvantage. It can, said Fullagar J in *Blomley v Ryan* (1956) 99 CLR 362 at 405, be important in either or both of two ways – firstly, as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion by the other party.

[31] Once the two essential elements ((a) special disadvantage/ disability and (b) a taking advantage of it) are established by the plaintiff (weaker party), the transaction will be set aside unless the stronger party can justify it by showing that the transaction was "fair, just and reasonable": *Amadio* at 474 (Deane J). This can be achieved by showing that the consideration passing to the

weaker party was adequate and that the terms of the transaction were fair in all the circumstances.

(c) Unconscionable conduct – this case

[32] With these principles in mind we now consider the transaction involved in the 2007 tenancy agreement.

[33] The respondents complain that they were unaware of or misled about two particular matters:

(a) that the tenancy was of both floors of the building; and

(b) that Mrs. Yang was able to sublet the ground floor, which she had done on terms very advantageous to her.

[34] They painted a picture of Mrs. Yang's having first come to the property without their knowledge as subtenant of Tsay of the ground floor and then having negotiated herself into a position of holding a 10 year tenancy of a two storey building without any obligation to make ongoing rent payments.

[35] But the respondents' picture ignores or plays down the fact that it was Mrs. Yang who paid for the construction of the upper floor,

with their assent, and that they are going to have it back for their own use in 2023, having not themselves incurred any expenditure. They eventually get the full benefit of the enlargement of the building.

[36] The respondents may have been unaware of the subtenancy to Zhufu Wei but, consistently throughout all the agreements, including the one signed in 1999 on which 'Olioni had legal advice, they had placed no restriction on assignment or subletting.

[37] It was said for the respondents that they suffered a disability of which Mrs. Yang took advantage because they could not read documents written in English and misunderstood what Mrs. Yang was proposing in 2007. They did not have the benefit of independent legal advice. But as we have observed, they were not misled about the matters that they principally say are of concern (scope of tenancy and ability to sublet). And, although it is possible Mrs. Yang and 'Olioni may have struggled with their English in the telephone calls, they do appear to have been able to reach an agreement that there would be a new tenancy beyond the term of the 2005 agreement.

[38] Moreover, contrary to the Judge's finding, Matelita did have an ability to read and understand a short document in English. She admitted that she had read and understood the 2005 agreement. She did not in 2005 raise a concern about how the arrangements differed from those in 1999. That is hardly surprising when she was aware that its purpose was to enable Mrs. Yang to build the upper storey with some security of tenure. The 2007 agreement then altered the conditions of tenancy only in relation to (i) the term, (ii) the amount of the advance rental and (iii) the insertion of a compensation figure. Those matters were not complicated or difficult for a lay person to comprehend. The Judge found that Matelita saw the 2007 document only on the day of signing but in fact she had ample opportunity to read it in the 9 days that elapsed before the corrected version (changed only in one respect) was presented to her for signing.

[39] Matelita says that Mrs. Yang, whom she regarded like a mother and trusted, then took advantage of her by withholding TOP$16,000 of the 2007 advance payment of rent. But, assuming Mrs. Yang in fact had no right to make a deduction, that action in breach of contract did not make the transaction

itself (the tenancy agreement) unconscionable. Matelita and her husband could have brought proceedings to recover the TOP$16,000. They failed to do so until their claim was time barred.

[40] The 2007 tenancy agreement was not well drafted but does state the fundamentals of the transaction, as did the 2005 agreement. We are satisfied that, even without independent legal advice, Matelita must have understood that the term was 10 years from 2013 and the rental TOP$35,000. She must also have understood that the purpose of the extended term was to compensate Mrs. Yang for her large expenditure on the upper storey. Counsel did not suggest to us that the explanation of the agreement given to Matelita by Mrs. Yang's son was misleading. We have already found that she must have known the tenancy was of the whole building.

[41] But, even if we had been of the view that 'Olioni and Matelita suffered from a disability and that Mrs. Yang took advantage of it, we nevertheless would conclude that the transaction was fair, just and reasonable in the particular circumstances.

[42] Much has been made for the respondents about the level of rent obtained from the subtenant of the ground floor (TOP$2000 per week) as compared with the advance payments, which if spread over the term of the lease would equate to only $291.60 per week. But that fails to factor in the cost to Mrs. Yang of constructing the upper storey which was at least the agreed compensation amount of TOP$170,000 – a figure not challenged as being exaggerated or unrealistic. Furthermore, the rent payable for the ground floor till 2008 was $400 per month (and even that seems to have been reduced by agreement). We know nothing of the circumstances in which the building was let in 2009, and whether they were substantially more favourable for a landlord than in 2007, nor do we know why Zhufu Wei was prepared to pay as much as $2000 per week.

[43] Mrs. Yang had paid out or agreed to pay immediately at least TOP$205,000 for the construction of the upper floor and the advance rent relating to the 2007 tenancy. She had borrowings incurred to fund that expenditure. Tongan rates of interest are comparatively high. She needed to be able to recover her expenditure by 2023 out of rentals to be received from the building and it was reasonable for her to expect to make some

profit after that recovery. She also bore the risk of any default by her sub-tenant. None of these matters appears to have been considered by Scott J in coming to the conclusion that the transaction should not be enforced. When proper allowance is made for the factors we have mentioned and for the respective timings of the expenditure in 2006 – 2007 and the receipts of rent spread over 15 years, the transaction does not seem to us to be an unfair one.

[44] Finally, we should mention two submissions made by Mrs. Taufaeteau, appearing on behalf of Matelita. She argued that the construction costs should not be taken into account in determining the fairness of the tenancy agreement because they had been incurred before the agreement was made and were past consideration. However, we are not concerned with whether a contract came into existence. It clearly did and the agreement to pay TOP$35,000 advance rent provided "true" contractual consideration. We are, rather, concerned with whether the bargain made between the parties was fair, just and reasonable in all the circumstances, including the history of the relationship of the parties. Justice requires that all benefits received by the respondents be brought into account. It would be artificial and

unfair to Mrs. Yang not to do so. The second submission was that the respondents had suffered a detriment because of the failure of Tsay to pay rent from 2003 to 2008. But that was not something for which Mrs. Yang had any responsibility. Her obligation until 2008 was to pay rent to Tsay and it was for him to pay the respondents.

[45] The defence of unconscionability fails. We make the following orders:

(1) The appeal is allowed.

(2) The respondents must specifically perform their obligations under the tenancy agreement signed on 29 October 2007 according to its terms.

(3) The respondents are enjoined from taking any steps either personally or by their contractors or agents to prevent or interfere with (a) access to the building by the appellant or her subtenant or invitees of either of them and (b) the operation therein of the business of the appellant or her sub-tenant, such injunction to apply during the currency of the said tenancy or until any earlier order of the Supreme Court.

(4) The appellant is awarded costs in the Supreme Court and in this Court, to be taxed in the respective Courts if not agreed upon. The respondents are jointly and severally liable for the costs and for such disbursements as are ordered by either Court to be paid to the appellant.

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Moore J

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Blanchard J

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Hansen J