Solicitor General.
11/09/17

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

AC 6 & 7 of 2017 Sam, email, upload + file.
[LA 29 of 2015]

AC 6 of 2017

BETWEEN : LORD NUKU

- Appellant

AND : 1. LORD LUANI
2. YAN JIAN GROUP CO. LIMITED
3. YAN JIAN TONGA LIMITED

- Respondents

AND AC 7 of 2017

BETWEEN : 1. YAN JIAN GROUP CO. LIMITED
2. YAN JIAN TONGA LIMITED

- Appellants

AND : LORD LUANI

- Respondent

Coram : Paulsen P
Handley J
Blanchard J

Counsel : Mr. W. C. Edwards SC for the Appellant in AC 6/2017 and the Second Appellant in AC 7/2017
Mrs. P. Tupou for the First Appellant in AC7/2017 and Third Respondent in AC6/2017
Mr. S. Fonua for the First Respondent in AC6/2017 and Respondent in AC7/2017

Date of Hearing : 4 September 2017

Date of Judgment : 6 September 2017

recd 08/09/17

JUDGMENT OF THE COURT

[1] These appeals from the judgment of Scott J sitting with an assessor in the Land Court concern the title to tax allotment Lot 85 B/K 76/95 at Malapo, comprising an area of 8 acres 1 rood which forms part of Lord Luani's hereditary estate. Appeal no 6 of 2017 was lodged by Lord Nuku, the first defendant, and appeal no 7 was lodged by the second and third defendants Yan Jian Group Co Limited and Yan Jian Tonga Limited (the companies). Lord Luani sued the defendants on various causes of action based on quarrying on Lot 85 between 2011 and 2013 to obtain aggregate for use in road construction. The quantity removed was found to be 85,009 cubic yards of rock.

[2] On 5 May 2017 Scott J gave judgment in favour of Lord Luani for TOP $5,556,000 against Lord Nuku and the companies jointly and severally as damages for trespass to Lot 85. He found substantially in favour of the defendants on Lord Luani's claims for mesne profits or damages for trespass in relation to Lot 90. There has been no appeal from the judgment on the Lot 90 claims, and we will say no more about those claims.

[3] The summary of the facts that follows is based on the findings of Scott J unless otherwise indicated.

[4] Before the events that gave rise to the claims now in question Lot 85, was owned by Paula Kava. At some time towards the end of 2010 Lord Nuku approached him with a view to acquiring Lot 85 in order to make it available to "The Chinese Technical Team", the trading name of the second defendant. An informal agreement was reached for Mr Kava to apply under s.54 of the Land Act for consent to the surrender

of Lot 85. This would normally enliven an entitlement in his heir under s.54 to claim the Lot for himself but Mr Kava promised that his heir would not make such a claim. If after 12 months from publication of notice of the surrender no such claim had been received the Lot would revert to the Estate holder, in this case Lord Luani, under s.54. Lord Nuku's son, Mr Valevale, would then apply for the Lot for himself. In return Mr Kava would receive a tax allotment at Ha'ateilho and Lord Nuku would pay him TOP$130,000.

[5] Mr Kava lodged his application for consent in January 2011. On 24 January he wrote to "The Chinese Technical Team" stating that he had surrendered Lot 85 to Mr Valevale. The letter was also signed by Mr Kava's heir and by Mr Valevale. On 31 January Lord Nuku entered into an informal agreement with "The Chinese Technical Team" which Scott J held "leased" Lot 85 to the second defendant for 20 years and authorised its use as a quarry for the extraction of stone for road works. In a letter attached to this agreement Lord Nuku "certified" that the land could be legally used as a quarry. The rent for the 20 year lease was TOP$500,000 to be paid within 7 days.

[6] On 24 February 2012 Cabinet consented to the surrender but said nothing about a grant to Mr Valevale and on 7 May the first s.54 notice was advertised. Mr Kava's heir did not apply for the Lot within the 12 months that followed and on 8 May 2013 it reverted to Lord Luani.

[7] Mr Edwards and Mrs Tupou challenged the finding that Lot 85 had reverted to the hereditary estate of Lord Luani since there was no evidence that all the advertisements required by s.54 had been published. This submission must fail because the reversion was

admitted on the pleadings and evidence of the facts was not required. In any event s.54 (1) and (3) clearly provide for the allotment to revert to the holder of the hereditary estate if the heir of the previous owner fails to claim the land within 12 months after the appearance of the first advertisement. A disappointed heir may be able to bring a late claim but a stranger whose rights were not affected cannot complain.

[8] Mr Edwards and Mrs Tupou based a further challenge to the rights of Lord Luani on ss 72 and 73. Mr Kava agreed to surrender Lot 85 in return for payment of TOP$130,000 and the grant of a tax allotment in Ha'ateiho. In his application to surrender he nominated Mr Valevale to succeed him as the new owner of Lot 85.

[9] Mr Edwards and Mrs Tupou argued that Lord Luani was not entitled to damages because the Minister was bound to grant Lot 85 to Mr Valevale, and therefore the quarrying had not caused him any substantial loss. There are many answers to these submissions.

[10] In the first place neither Mr Kava nor Mr Valevale were parties to the proceedings in the Land Court, and any interference with their rights cannot be relevant.

[11] In any event Mr Kava had no right either under ss 72 and 73 or under s.54 to bind the Minister to grant the surrendered Lot to the person he nominated. Hampton CJ said in *Sakalia v Vailea & ors* [1995] Tonga L.R 130, 135:

> "(d) The person surrendering ... is not given power to impose conditions on the surrender e.g. who should succeed him to the land; succession to the land is determined by the law.

(e) The surrender of land ... was complete when cabinet gave its consent and the [former holder] has no more interest in the lands".

[12] Scott CJ said in *Tu'akoi v Tu'akoi* [2016] TOLC 5 at [26], [27]:

"[26] The Act provides a procedure for advertising the pending reversion of a surrendered allotment and gives an opportunity to claimants to the legal succession to the land to notify the Ministry of their claim which, if upheld, prevents reversion occurring. There is no statutory procedure for advertising an intention to apply for permission to surrender and there is no provision for persons other than those who can advance a section 82 right to inherit to be notified that the application is pending or even to register their interest, whatever it might be, prior to the expiry of the 12 month notice period.

[27] In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for the land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperilled by the reversion itself".

[13] Moreover there is no evidence that Mr Valevale ever applied to become the holder of Lot 85, or sought Cabinet approval under s.56 for the lease of the Lot to the second defendant.

[14] In any event the reversion of Lot 85 to Lord Luani was likely to be a substantial benefit to him. He was entitled, under ss 8 and 34(2) to be consulted before a tax allotment was granted from his hereditary estate. Section 34(1) entitled him to reserve part of his hereditary estate for his sole use and s.33 gave him the right, subject to the

approval of Cabinet, to lease up to 5% of the total area of his hereditary estate.

[15] The defendants did not lead evidence or cross examine Mr Moala, the Registrar of Lands, to establish, if possible, the existence of a practice of the Ministry in dealing with applications under ss 33 and 34 which could limit the benefits a hereditary owner could receive from an allotment that had reverted to him under s.54.

[16] The Judge said that it was common ground at the trial that shortly after 24 January 2011 the second defendant entered onto Lot 85 and commenced quarrying. Quarrying continued until a date early in May 2013 when, after the Lot had reverted to Lord Luani, he re-entered, stopped further quarrying and excluded the second defendant.

[17] The principles which govern the liability of joint tortfeasors are well established. In The Koursk [1924] Probate 140,155 CA Scrutton LJ said that joint tortfeasors include:

> "...persons who agree on common action in the course of which, and to further which, one of them commits a tort...there is one tort committed by one of them on behalf of, and in concert with another."

[18] The principles were helpfully elucidated by Lord Neuberger in *Vestergard Frandsen A/S v Bestnet Europe Ltd* [2013] 4 All ER 781,790 [34]:

> "...in order for a defendant to be party to a common design [he or she] must share with the other party or parties to the design each of the features of the design which make it wrongful. If, and only if, all

the features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some of the relevant acts, will not stop all from being jointly liable."

[19] These principles were applied to a case of private nuisance in *Harris v James* (1876) 45 LJ QB 545 at 546 where Blackburn J said:

> "...the field was let for the very purpose and object of being worked as a lime quarry...When then it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object then I think we must say that the landlord authorised...the nuisance arising from it as being the necessary consequence of letting the field in the manner and with the objects described."

[20] Lord Nuku did not do any of the quarrying himself or employ others for that purpose, but by the agreement of 31 January 2011 and his accompanying letter he authorised the second defendant to enter and carry out quarrying operations on Lot 85. Moreover the high rent payable to Lord Nuku evidenced a joint enterprise in the use of the land for a quarry with the proceeds shared between the parties, albeit unequally. In our judgment that implicated him in the trespasses committed by the second defendant.

[21] However there is no evidence that the third defendant was involved in the quarrying operations carried out after its incorporation on 20 June 2012. Accordingly the judgment for damages against the third defendant as a joint tortfeasor must be set aside.

[22] The re-amended statement of claim pleaded a title in Lord Luani to sue in trespass based on the doctrine of trespass by relation. Since trespass is essentially an injury to the plaintiff's possession, a plaintiff out of possession with a right to immediate possession could only sue in trespass by the doctrine of relation under which, by a fiction, the plaintiff was treated as having been in possession since his right to immediate possession accrued. We agree with Mr Edwards' submission that Lord Luani did not have a right to immediate possession during the period between the submission of Mr Kava's application for leave to surrender his allotment and its reversion to Lord Luani pursuant to s.54. We also agree that the reversion did not operate retrospectively to any earlier date.

[23] This does not matter because the re-amended statement of claim alleged that Lord Luani's reversionary interest had been damaged by the removal of so much rock from the land, and the necessary facts were pleaded. Clerk & Lindsell on Torts 20th ed 2014 page 1234 states:

> "Although, in general, the only person who can sue for a trespass is the person who was in actual or constructive possession at the time of the trespass, an exception exists where the trespass has caused a permanent injury to the land affecting the reversionary interest. The reversioner may sue at once without waiting until his future estate falls into possession."

In *Jones v Lanwert UDC* [1911] 1 Ch 393, 404 Parker J said:

> "...a reversioner cannot maintain actions in the nature of trespass...without alleging and proving injury to the reversion. If the

thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question [of fact]."

[24] However the gross value of the rock extracted adopted by the Judge as the measure of damages based on *Martin v Porter* (1839) 5 M & W 351, cannot be supported. The general rule emerging in later cases is that the plaintiff is not entitled to the gross value of the minerals extracted by the trespasser, but only the net value after allowing for the cost of extraction. In general the compensatory principle applies because the plaintiff could not have obtained saleable minerals without incurring the cost of extraction. See *Jevon v Vivian* (1871) LR 6 Ch App 742, 760-1 per Lord Hatherley LC:

> "Now it strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for getting and hewing. Suppose the mine worked out, then what he has lost is the coal, but this rule [*Martin v Porter*] would give him besides all the cost of getting and hewing."

[25] In *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 34-5 Lord Hatherley said:

> " ...the owner shall be re-possessed as far as possible of that which was his property ... that has been...removed...which cannot..be restored in specie [and that] there shall be such compensation made to him as will in fairness to both parties give to the one party the whole value of that which was his, and will at the same time give to the other...just allowances for all of those outlays which he would have been obliged to make if he had been entering into a contract for

that being done which has, by misfortune and inadvertence on both sides, and through no fault been done."

These principles were applied by Lord Macnaghten in *Peruvian Guano & Co v Louis Dreyfus & Co* [1892] AC 166 at 174-6. The exception which allows the owner to recover the gross value of the severed minerals only applies in cases of fraud or conscious wrongdoing.

[26] The principles derived from *Martin v Porter* were summarised by Todd "The Law of Torts in New Zealand" 7th ed 2016, para 9.2(4):

> "Where the trespass is committed knowingly and deliberately the measure of damages is the market value of the material ... when it was first severed from the land and became a chattel, without any allowance to the trespasser for the cost of getting and severing. Where the defendant is not guilty of fraud or conscious wrongdoing the penal rule does not apply and the plaintiff's damages are confined to ... the value of the ... minerals in the ground".

[27] The general rule was applied in *Townend v Askern Coal & Iron Co* [1934] Ch 463 where the defendant mined the relevant land after it had applied to a statutory authority for leave to do so before leave was granted, because the trespass was not fraudulent but inadvertent.

[28] There is no finding and no evidence that Lord Nuku and the second defendant were guilty of fraud or conscious wrongdoing.

[29] Accordingly the judge's award of TOP$5,556,000 for the gross value of the rock extracted must be set aside. It was based on the evidence

of Semisi Topui. This witness calculated the net value of the rock extracted, after allowing for the cost of extraction, at TOP$3,380,335.

[30] The appeals must be allowed to the extent of substituting judgment against the first and second defendants for the lower figure in lieu of that entered by Scott J.

[31] The following orders should be made:

1. Appeals by Lord Nuku and Yan Jian Group Co. Ltd allowed in part.
2. Judgment for the Plaintiff in the Land Court against Lord Nuku and Yan Jiang Group Ltd in respect of Lot 85 set aside.
3. In lieu thereof judgment for the Plaintiff against Lord Nuku and Yan Jiang Group Ltd for TOP$3,380,335 and costs with effect from 5 May 2017 with interest at the rate of 10% per annum from that date until satisfied.
4. Appeals by Lord Nuku and Yan Jiang Group Ltd otherwise dismissed with no order as to costs.
5. Appeal by Yan Jian Tonga Ltd allowed with costs limited to the additional costs incurred by reason of its joinder in the appeal by Lord Nuku.
6. The judgment for the plaintiff against Yan Jian Tonga Ltd set aside.
7. In lieu thereof enter judgment for Yan Jian Tonga Ltd in the action.

8. The Plaintiff to pay the costs of Yan Jian Tonga Ltd of the proceedings in the Land Court limited to the additional costs incurred by reason of its joinder with the second defendant.

9. Costs, if not agreed, to be fixed by the Registrar.

.....

Paulsen P

.....

Handley J

.....

Blanchard J