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IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION AC 13 of 2018

NUKU'ALOFA REGISTRY [LA 23 of 2017]

BETWEEN : SIOSAIA PEKIPAKI

- Appellant

AND : 1. MELE'ANA MOIMOI

2. MINISTER OF LANDS

- Respondents

Coram : Handley J

Blanchard J

Randerson J

Counsel : Mr. W. C. Edwards SC for Appellant

Mr. V. Mo'ale for First Respondent

Mr. S. Sisifa SC for Second Respondent

Hearing : 12 April 2019

Date of Judgment : 17 April 2019

JUDGMENT OF THE COURT

Introduction

[1] On 28 January 2009, on an application made by a brother and sister, both of whom were over 70 years of age, Cabinet approved a 60 year lease to them of a property in the central business district of Nuku'alofa on which there were two buildings used partly for residential and partly for commercial purposes. The family in question had been associated with the property for many years.

[2] Both the brother, Tevita Moimoi, and the sister, 'Ofa Pekipaki, have now passed away and their successors are in dispute over whether, on the death of Tevita on 15 March 2015, the interest he held in the lease was taken by 'Ofa as survivor of a joint tenancy. That is contended for by 'Ofa's son, Siosaia Pekipaki, the present appellant. Siosaia is the duly appointed administrator of 'Ofa's estate, she too having died, on 15 April 2016. Siosaia's claim is disputed by Tevita's widow, Mele'ana Moimoi, who says that in fact the lease was held by Tevita and 'Ofa as tenants in common. A grant of administration of Tevita's estate has belatedly been applied for and that application is pending in the Supreme Court. We were advised from the bar that the Minister has given an instruction under s.12 of the Probate Act.

[3] Niu J held in a judgment delivered on 31 August 2018 that there was a tenancy in common in equal shares. Siosaia appeals to this Court alleging that Niu J was led to the wrong result by making a number of factual errors.

The facts

[4] The property involved in this case consists of 891.99m^2 in the estate of the Crown. It is situated on the south-western corner of Salote Rd and Railway Rd, Kolofo'ou.

[5] Sela Moimoi, the mother of Tevita and 'Ofa, held a lease on the land, transferred to her by her father, from a date in 1954. She renewed it for a term expiring on 23 February 1990. From about 1967 'Ofa and her husband, Kelepi Pekipaki, carried on a retail and wholesale business at the property. They erected buildings on it for that purpose and for renting to tenants. Sela lived upstairs in one of the buildings. The arrangements between Sela and 'Ofa and Kelepi were informal. There was no sub-lease.

[6] In 1990 Sela's lease was not renewed because the Government intended to use the land itself, though that never in fact occurred. Sela, 'Ofa and Kelepi continued to occupy the property but, in 1995, following Kelepi's death in 1993, 'Ofa discontinued the previous business. The Government granted occupation permits to four persons to carry on business. Three of them did so from the existing buildings and paid rent for the premises to Sela Moimoi. The fourth was allocated vacant land but never built on it.

[7] Sela Moimoi died in 1999. Tevita and Mele'ana had until then lived at Tofoa. They moved to the property after Sela's death. It is in dispute whether there ever was some informal arrangement between Tevita and 'Ofa for the sharing of rents from the property. Both seem to have obtained part of the rents.

[8] In 2007 'Ofa moved to the United States but she also made an approach to the Minister of Lands, Hon. Noble Tuita, for the granting to her of a lease of the land. In February 2008 both 'Ofa's daughter, Fale'aka, and Tevita

had a meeting with the Minister. The minutes of the meeting record that the Minister had received a letter from 'Ofa saying that she and Tevita had agreed on a "joint lease". But Tevita told the Minister he did not want this and asked for a lease in his name alone. Fale'aka pointed out, however that 'Ofa had been the one who worked on the land and said that "we all survived from it including Tevita and all the family". Tevita then proposed that a part of the land should be leased to 'Ofa and the rest to himself because 'Ofa had always received $600 from one of the tenants.

[9] The Minister offered the opinion that there should be a joint lease to both of them because "the purpose is for business not residence". He asked to be advised "who in the Moimoi family will be joint lease – to establish a business". Fale'aka thanked him for that decision and said that "the request is that the two of them, Tevita and 'Ofa be joint lease and leave the rest of the family".

[10] On 23 April 2008 the Secretary for Lands wrote to Tevita formally advising him of the Minister's decision. 'Ofa and Tevita completed and signed a lease application form. It stated that the purpose of the lease was "commercial and residential." On 28 January 2009 Cabinet approved a 60 year lease at a rent of $1200 per year with the term running from the date of registration. The lease was registered as Lease No.7899 on 5 October 2010.

[11] Events since that time in relation to the property have been much disputed but it is clear that until his death Tevita continued to occupy a part of the two storey building as his residence and to collect rents. 'Ofa also received the rent of one of the tenants. Tevita also seems to have paid the lease rent of $1200 per year until 2013 but it then fell into arrears. Mele'ana now occupies the residence.

The judgment below

[12] Niu J found no evidence that 'Ofa and Tevita had any intention that when either would die their interest in the lease was to became the sole property of the survivor or that that was what the Minister of Lands intended. He had meant that the two of them were to hold the lease not only for themselves but also for their respective families as well, and that when they died those families would succeed to the respective shares.

[13] The Minister had insisted that the lease be for business (commercial). Niu J commented:

> If in pursuance of that Tevita was to build a big building and carry on a business in it and dies shortly afterwards, it is inconceivable that he would have agreed or had intended that that big building and business were to be pulled and closed down so that 'Ofa would own the whole land of the lease. If in pursuance of the purpose of residential as approved by Cabinet, he was to build a dwellinghouse and live in it with his wife and children and dies shortly afterwards, it is inconceivable that he would have intended that his wife and children would have to pull down the dwellinghouse and move out so that 'Ofa would have the whole lease to herself.

[14] Both lessees were advanced in their years in 2010 – in their 70s. It was "inconceivable that they would each have asked for a share in a 60 year lease only to give it away to the survivor a few years later, much to the loss of his/her own family". The form of the prescribed lease – to "the Lessee, his heirs, and representatives" – provided, the Judge said, that the heirs of the lease are to hold the piece of land described in the lease until the end of the term of the lease. They succeed to it on the lessee's death.

[15] Niu J held that 'Ofa and Tevita were according tenants in common, each with an undivided share of the lease which now constituted their respective estates. He dismissed Siosaia's claim.

Discussion

[16] Despite Mr. Edwards SC's valiant efforts in which he said everything that could possibly be said for his client, we see this as a very clear case.

[17] In *Wight v Wight* AC3/2018, 7 September 2018, a decision delivered after Niu J's judgment in this case, this Court quoted and adopted Lord President Paulsen's summary of the difference between a joint tenancy and a tenancy in common (at [16] of this Court's judgment) and we see no need to repeat it . We also said:

> The Lord President said, correctly, that for historical reasons the common law favours joint tenancies. In circumstances where a lease is owned jointly the common law will presume that the lessees are joint tenants. But equity is hostile to that and in certain circumstances will treat what would otherwise be regarded as a joint tenancy as a tenancy in common. This is because the right of survivorship unduly favours the person of longevity for no better reason than the accident that he happens to survive his co-owners (Meagher Gummow and Lehane's *Equity Doctrines and Remedies* 4ed at 103).

[18] We referred also to the Lord President's reference to Baroness Hale's comment in *Stack v Dowden* [2007] UKHL 12, [2007] 2 AC 432 at [57] that a joint tenancy has a tontine "winner takes all" effect, which in *Wight* was highly unlikely to have been intended. We regard it as a highly unlikely intention in the present case for the reasons that follow.

[19] Whether there is an intention to have a tenancy in common in equity is judged objectively in light of all the circumstances when the asset in

question is acquired jointly by the parties or their predecessors in title. Often they will not have put their minds to the question of inheritance of their joint interests and the Court than has to determine what they would most likely have wanted if they had been fully informed about the consequences of the choice between joint tenancy and tenancy in common. An objective intention is a presumed intention from the circumstances of the case when the parties were silent, or did not express themselves clearly, on the issue of inheritance of the asset.

[20] In *Malayan Credit Ltd v Jack Chia – MPH Ltd* [1986] AC 549 at 560 the British Privy Council said that it was improbable that where premises were held by two persons as joint tenants at law for their several (ie separate) business, they would intend to hold as joint tenants in equity. Their Lordships indicated that this was merely an example and, giving further examples of tenancies in common in equity said that there were yet other circumstances "in which equity may infer that the beneficial interest is intended to be held by the grantees as tenants in common".

[21] In *Wight* this Court recognised that where the joint interest is in a registered lease the position at law is that the lease is held on a joint tenancy:

> However, equity does not displace the position at law. Indeed it cannot possibly do so in the case of a registered lease. The legal interest in the lease was, and remains, held on the joint tenancy; but equity requires that the legal owners (or survivor) must beneficially deal with the property as a tenancy in common which, depending upon the actual arrangement between them, may be in equal or unequal shares. Those shares are in the whole of the lease; they are undivided shares.

[22] Mr. Edwards made numerous criticisms of Niu J's findings of fact concerning aspects of the occupation of the subject property and what had occurred in relation to rentals paid to the family members by those persons granted occupation permits by the Government. Some of the points made

by counsel concerned what happened after the Cabinet approval of the lease in 2009 and were not germane to the question of what was to be inferred from the circumstances at that time. What is crucial is what was, objectively, intended when the lease was applied for and put before Cabinet by the Minister of Lands.

[23] Counsel also laid some emphasis on the fact that 'Ofa and her husband had been associated with the property for many years and had carried out improvements on it. Their efforts had created much of the value of the property. Mr. Edwards also pointed out that Sela Moimoi's leasehold interest had ceased in 1990. The lease that issued and was registered in 2010 was not a renewal of Sela's lease and therefore "not an inherited lease". There is some force in these points but it seems to us that it is overwhelmed by three of the circumstances.

[24] First, there is the purpose for which the property was in use in 2009 and for which the lease was applied for and granted: "commercial and residential". Once there is a commercial or partly commercial purpose the likelihood is that a tenancy in common will be intended. Here there were commercial tenancies with some sharing of rents between both sides of the family (though exactly how this was done is in dispute).

[25] The second circumstance is that when 'Ofa, through her daughter, Fale'aka, and Tevita approached the Minister, each seeking a lease that would exclude the other in whole or part, it is plain that they were advancing the respective causes of their own families. The Minister asked "who in the Moimoi family will be joint lease". That appears to us to be seeking identification of some individuals to represent the branches of the family. The Minister appears to have been well aware of the existence of a dispute between the children of Sela Moimoi. In the end he approved a lease to the two heads of the branches of the family.

[26] The third circumstances is the most compelling in favour of the objective intention having been for a tenancy in common. We agree with Niu J that it is "inconceivable" that, given the history of disharmony within the family, a sister aged nearly 80 and a brother well into his 70s, who had been unable to settle their differences, would have contemplated taking a 60 year lease on a valuable property in Nuku'alofa, partly used for commercial purposes, on the basis that when, a comparatively few years later, one of them would die the other would take everything by survivorship – would win the tontine.

[27] These three circumstances, especially the last of them, are a very powerful indication that although at law – on the land register – the lease was expressed in the form of a joint tenancy, it must be regarded in equity as a tenancy in common. No argument was made to us that the shares in the tenancy in common were unequal. Niu J decided in favour of equal sharing no doubt bearing in mind equity's maxim that equality is equity.

[28] In answer to another point made by Mr. Edwards, we should add that the fact that after the grant of the lease 'Ofa and Tevita were never able to reach agreement on the sharing of the property and its rents does not affect their entitlements in equity. If one has in practice taken more than a half share of income derived from it since the term of the lease commenced there may have to be an accounting between their two estates.

[29] The position is now that, as survivor, 'Ofa became entitled to apply to be registered as the sole lessee. Siosaia as administrator of her estate can now do that. However, he will hold the lease beneficially (in equity) as to an undivided one half share for the heirs of 'Ofa and, as to the other share, in the meantime pending a grant of administration of Tevita's estate, for the Crown under s.12 of the Probate Act and, when and if a grant is made, for the administrator of Tevita's estate and through that person for Tevita's heirs.

[30] The appeal is dismissed with costs to the first respondent.

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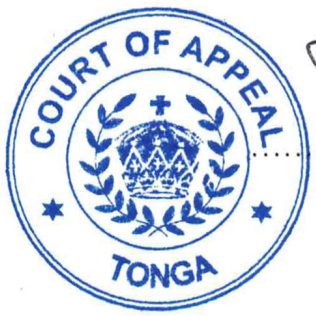
Handley J



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Blanchard J

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Randerson J