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IN THE COURT

OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

AC 5 of 2021

BETWEEN NEIL TAUFAHEMA

Appellant

AND PAULA TAUFAHEMA and MINISTER OF LANDS

First Respondent

AND MINISTER OF LANDS

Second Respondent

Court: Hansen J
White J

Counsel: Mr D. Corbett for the Appellant
Mr V. Mo'ale for First Respondent
Mr S. Sisifa for Second Respondent

Hearing: 23 September 2021

Judgment:

JUDGMENT OF THE COURT

Received.
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JUDGMENT OF THE COURT

Introduction

[1] The appellant, Neil Taufahema (**Neil**), has appealed against a judgment of the Lord Chief Justice issued in the Land Court on 31 December 2020. He applied for leave to adduce fresh evidence on the appeal. The application was determined by Justice Randerson on the papers on 11 May 2021 pursuant to Order 7 r 2(4)(b) of the Court of Appeal Rules. He dismissed the application.

[2] The application having been refused, the appellant seeks leave to renew the application pursuant to Order 7 r 3 of the Court of Appeal Rules. For this purpose and for the purpose of the substantive appeal, pursuant to rule 2 of the Court of Appeal (Constitution of Court) Rules the Court was constituted by two members of the Court of Appeal.

[3] The second respondent, the Minister of Lands (**Minister**), appeared but made no submissions, electing as he did when the application was heard by Justice Randerson, to remain neutral on the issue.

Background

[4] Neil and the first respondent (**Paula**) are brothers. Neil was registered as holder of a town allotment in 2017. Registration took place on the assumption that the allotment had been effectively surrendered after the then holder of the allotment, Sitalini Taufahema, the eldest brother of Neil and Paula who had no children, had surrendered the allotment in 2007 and, following the consent of the Cabinet to the surrender in 2009, the allotment had reverted to the estate holder pursuant to s 54 of the Land Act. The circumstances in which the surrender took place are comprehensibly reviewed in the judgment of the Land Court[1]. A critical issue for determination in the Land Court was whether the Minister had complied with the requirements of s 54(2) to advertise Cabinet's consent to the surrender. The Land Court found he had not complied with the consequence that the allotment never reverted to the estate holder and could not be the subject of a grant by the Minister.[2]

[5] The critical issue in relation to advertising was whether notice of the Cabinet's consent to the surrender had been published in three issues of a Tongan weekly newspaper

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[1] *Paula Taufahema v Neil Taufahema and Minister of Lands* (LA6 of 2019, 31 December 2020) at [10]-[19].
[2] At [93] – [110].

within two months of the date of the notice. In the Land Court it was found that the evidence did not establish that the notice as required by s 54(2) had been so published.

[6] There was no direct evidence that advertising had taken place. In contending that it had, Neil relied on a receipt from the file of the Ministry of Lands that was produced in the course of the trial by an officer of the Ministry. It was for $41.40 received by the Ministry from Sela Pomana, the sister of Neil and Paula. The receipt was stated to be in respect of "Land Notice". Sela herself could not remember why she made the payment. The Ministry Officer, Mr Halatanu, was unable to say what the receipt was for. He said it would not have been for the surrender notice because the Ministry did not charge for that. He could do no more than acknowledge the possibility that the payment related to advertising the Ministry itself had undertaken and that it had lost the receipt for the cost.

[7] The Lord Chief Justice found this evidence did not establish that advertising in a newspaper had taken place. As it was accepted that there was no evidence of advertising in the Gazette, the conclusion that s 54(2) had not been complied with was inevitable.

Grounds of appeal

[8] Neil appeals against the judgment of the Land Court on the grounds that:

(a) New evidence shows that publication did take place and that the receipt for $41.40 was the publication fee;

(b) The Land Court erred by not accepting that, on the balance of probabilities, the sum paid by Sela Pomana was the publication fee.

The new evidence

[9] The evidence Neil seeks leave to adduce on appeal is:

(a) Evidence that the sum of $41.40 referred to in the Ministry's receipt corresponds to the amount required for the publication of Cabinet's consent to the surrender in the local newspaper;

(b) Evidence of the publication in a local newspaper on 13 August 2013 of the names of 342 persons who had not paid publication fees following the giving of surrender notices.

Relevant principles

[10] It is accepted that the principles governing an application for leave to adduce further evidence are those laid down in *Takataka & Ors v Hurrell & Ors*.[3] Leave to adduce new evidence will be granted only if the following three conditions are fulfilled:

(a) The evidence could not have been obtained with reasonable diligence for use at trial;

(b) The evidence is such that, if given, it would probably have an important influence in the result of the case though it need not be decisive; and

(c) The evidence is such as it can be presumed to be believed.

Applicant's case

[11] Before Justice Randerson, and repeated in argument before us, Mr Corbett for Neil submitted that the new evidence could not with reasonable diligence have been obtained for use at trial. He said the receipt produced at the trial had not been discovered by the Ministry and had taken Neil and his counsel by surprise. Neil was thereby deprived of the opportunity to enquire into and adduce evidence on the cost or fact of advertising. Mr Corbett said the publication of the names of those who had not paid publication fees and which, relevantly, did not include the name of the allotment owner, had taken place seven years ago and could not reasonably have been discovered before trial.

Decision of Justice Randerson

[12] Justice Randerson acknowledged that the late production by the Ministry of the receipt meant that Neil was limited in his ability to address its significance during trial. He also accepted that evidence of the amount of the fee (as distinct from whether it was paid for publication) was not something Neil could have been expected to obtain with reasonable diligence in preparation for the trial.[4] He went on to say:

> "[13] However the fact remains that the Ministry accepted at trial that there was not evidence on their file that publication under s 54(2) had occurred and there was no other direct evidence on the issue. What is clear is that the late disclosed receipt was not from the newspaper but from the Ministry. No receipt from the newspaper itself has been produced. Sela (to whom the receipt from the Ministry was issued) has no recollection of it and cannot recall what it was for. Evidence that the amount of the Ministry's receipt may have been the same as the amount charged by the local newspaper for the publication of

[3] *Takataka & Ors v Hurrell & Ors* (CA) 2005 TLR 359.
[4] Judgment as [12].

such notices in 2008 does not amount to proof or tend to show on the balance of probabilities that publication actually occurred.

[14] It follows that the new evidence on this point is not such as to meet the second limb of the *Takataka* principles that it would probably have an important influence on the result of the appeal. The third limb relating to whether the evidence may be presumed to be believed has no application in the present case and need not be considered."

[13] As to the evidence of the list of names, Justice Randerson accepted the submission of Mr Mo'ale that it could have been discovered with reasonable diligence by Neil and his advisers prior to trial. He said they were well aware that the publication of the surrender notice was to be the critical issue. An enquiry to the newspaper as to the existence of any receipt or other evidence relevant to the issue should have been made and would likely have revealed the publication of the list of names in August 2013. He pointed out that the existence of the list was known to the parties in *Kaufusi v Lord Ma'afu Tuhui'aulahi and Minister of Lands*[5] a judgment that was issued more than a month before the trial in this case commenced.

[14] Justice Randerson found that, in any event, the evidence would not meet the second limb of the *Takataka* principles. He rejected a submission by Mr Corbett that the absence of a reference to the allotment holders name[6] would support an inference that publication must have occurred. Justice Randerson said that other than the reference to Niu J's judgment, there was no evidence to explain the reasons for the publication or to demonstrate its accuracy or whether it was an exhaustive list of all the cases over the relevant period. Further, he said, even if it were an exhaustive and accurate list, its existence does not, of itself, demonstrate that publication of the surrender notice occurred in or about 2008 or at all. Randerson J said that, at best, it is capable of showing by negative inference that the publication fee was paid at some point in respect of the disputed allotment. It fell short of showing, on the balance of probabilities, that publication of the surrender notice actually occurred.

Our view

[15] We see no reason to differ from the conclusions reached by Justice Randerson or from his reasoning. Like him, we accept that the late discovery and production of the receipt is a sufficient reason for the failure to adduce evidence in relation to the cost of advertising at trial. But we agree with Justice Randerson that evidence that a publication fee for the same amount was paid in 2020 would not assist Neil to establish

[5] [2020] TOLC 10; LA21/2018 (20 October 2020).
[6] Incorrectly referred to in the Judgment at [17] as Neil.

that publication actually took place in 2008. Much more would be required to support an inference that advertising occurred.

[16] Before us, Mr Corbett referred to an exchange that took place at trial between the Lord Chief Justice and counsel for the Minister (not Mr Sisifa) who had also appeared as counsel in *Kaufusi*. She was asked whether she had previously heard about the advertising procedure that Mr Halatanu had referred to. She said that in the case in which she had appeared, there was no issue about publication because the notice "was only published in one Tongan newspaper". Mr Corbett submitted, that had counsel disclosed what happened in *Kaufusi*, the issue could have been explored.

[17] On our reading of the transcript, it appears that counsel for the Minister had not appreciated that evidence of multiple notices being advertised at once in *Kaufusi* may have had potential relevance to the issues in the instant case. Had she done so, it seems likely that the implications of that advertisement would have been explored. While that does not undermine Justice Randerson's finding that enquiries of the newspaper would likely have revealed the existence of the advertisement, it lends weight to the argument that the possible significance of such evidence could reasonably have been overlooked. However, even if that provides some further justification for the failure to adduce the evidence at trial, it does not ultimately assist Neil.

[18] The list contained the names of allotment holders for whom notice of Cabinet approval for surrender of allotments had been published but who had not paid an advertising fee to the Ministry. As Justice Randerson explained in the passage from his judgment set out above,[7] the fact that the list did not include the name of the allotment holder in this case, could not by itself or together with evidence of the payment of a fee to the Ministry, support an inference that advertising had occurred. The list is evidence that a notice of Cabinet approval was published once for those whose names appear on it, but says nothing about those whose names do not appear. We are satisfied that the evidence would not assist Neil to establish that advertising had taken place.

[19] We conclude that the evidence of the list as well as of the cost of advertising does not meet the criteria for the admission of the fresh evidence on appeal. The first ground of the appeal must accordingly fail.

[20] The second ground of appeal challenges the Lord Chief Justice's finding that the receipt produced by Mr Halatanu was itself sufficient evidence that the Ministry

[7] At [11] above.

advertised the Cabinet's consent to the surrender. After carefully reviewing the evidence of Mr Halatanu as to the Ministry's practice at the relevant time, the Lord Chief Justice concluded that the receipt could not support an inference that the payment was for advertising fees paid to a newspaper. He accepted the evidence of Mr Halatanu that Ministry practice at the time was inconsistent with its having charged for the publication of a notice under s 54(2). We see no error in the Lord Chief Justice's reasoning or conclusion on this issue.

Result

(a) Leave to renew the application to admit new evidence is granted but the application is dismissed.

(b) The appeal is dismissed.

(c) The appellant must pay to the first respondent the costs of the renewal of the application and of the appeal as agreed or, if not agreed, as fixed by the Court.

Hansen J

White J