

**IN THE COURT OF APPEAL OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY**

**AC 24 of 2014  
[CV 11 of 2013]**

---

**BETWEEN : SEINI FINAU**

**- Appellant**

**AND : SIONE M. HEIMULI**

**- Respondent**

**Coram : Salmon J  
Moore J  
Blanchard J  
Tupou J**

**Counsel : Mr. Niu SC for the Appellant  
Respondent in Person**

**Date of Hearing : 23 March 2015**

**Date of Judgment: 31 March 2015**

## JUDGMENT OF THE COURT

- [1] The Chief Justice, from whose decision this appeal is brought, described the action as “the latest in a long saga of litigation ...” We agree with this assessment. From 1997 until 2012, when this Court found against the appellant, she fought a battle in the Land Court to prevent the respondent from obtaining title to land on which was situated a house and other buildings inherited by the appellant from her mother. In 1997 she was ordered to leave the land following its reversion to the Crown.
- [2] As already indicated the appellant was ultimately unsuccessful in this litigation. The current proceedings, issued after the above mentioned Court of Appeal decision, sought to recover damages, described in the statement of claim as “mesne profits”, relating to the occupation by third parties, but permitted by the respondent, of the house and an adjoining shop.
- [3] The damages claimed were calculated by reference to rents paid for similar property. In the case of the house and a water tank, this calculation was from the expiry of an order of the Court permitting the continuing occupation by the respondent’s nominees. The

rental claimed for the shop was for a longer period apparently from the date of the use of the shop by the respondent's wife's mother.

[4] Evidence was given at trial of what was said to be the rental of comparable buildings. It appears that at the time the court permitted the continuing occupation of the house by the existing occupants no provision was made for any compensation to the appellant. The appellant instructed her then solicitor to take proceedings to evict the occupiers but no such proceedings were taken.

[5] The Chief Justice dismissed the claim finding that a claim for mesne profits was misconceived. He said that at no time since the land reverted to the Crown has the Respondent had any right to the land except access to it to remove her chattels (the house and any other moveable buildings). He said that right must be exercised within a reasonable time and that such a time had expired. The right to enjoy the benefits of the ownership of the chattels had expired.

[6] We have concluded that the Chief Justice was right to dismiss the claim although our reasons for so deciding differ in some respects

from those of the Chief Justice. The plaintiff's claim was clearly one for damages for what she maintained was the unauthorised (by her) occupation of her property. All other things being equal the categorisation of those damages as "mesne profits" would not be fatal.

[7] We agree with the Chief Justice that from the time the land reverted to the Crown her only right was to access the land for the removal of her house. Indeed the respondent in his statement of defence acknowledged that she still had that right. Given the relatively short time since the final decision of this court in October 2012 we do not consider that the right has been abandoned. The claim for damages was made in February 2013 so that she has continued to assert a right arising from her ownership of the house. The position in relation to the shop is rather different. It was demolished and completely rebuilt. The appellant may well have a claim in conversion arising from that but her damages would probably be limited to the value of the building as a removal prospect. No such claim was advanced in the present proceeding.

[8] So far as the house is concerned we have considered whether the appellant is entitled to damages for conversion or trespass to

chattels. We have considered the judgment of Dixon J in *Penfolds Wines Pty Ltd v Ellcott* (1946) 74 CLR 204 (HCA) and have concluded that the following extract from *The Law of Torts in New Zealand* 3<sup>rd</sup> Edition p576 correctly states the law:

*"The dictum of Dixon J to the effect that no conversion could be committed where "there is no act, and no intent, inconsistent with the appellants' right to possession and nothing to impair or destroy it" is, it is suggested, correct and not contradicted by the findings of the individual judges. It is also supported by the logic inherent in the nature of the tort of conversion itself. Previous authority also justifies the opinion of Dixon J. For example, the view of Holt CJ<sup>1</sup> that conversion requires the assumption upon oneself of property and right of disposing of another's goods is to the same effect, and Lord Abinger CB in *Fouldes v Willoughby*<sup>2</sup> said that if the ferryman in that case had, rather than simply putting the plaintiff's horses ashore, thrown them into the water so that they drowned, conversion would have been committed. It is, therefore, suggested that the reason that mere using or handling of another's goods is unlikely to be conversion is not that the conduct complained of is trivial; rather, such conduct is perhaps unlikely to amount to a denial of the plaintiff's rights.*

[9] In this case there is no evidence of any loss to the plaintiff arising from the occupation of her home. She has no right herself to put tenants in the house while it sits on the respondents land. If there had been evidence of monetary benefit to the respondent restitutionary or other principles may have come into play. However

---

<sup>1</sup> In *Baldwin v Cole* (1705) 6 Mod 212; 87 ER 964

<sup>2</sup> (1841) 8 M&W 540 at 547; 151 ER 1153 at 1156

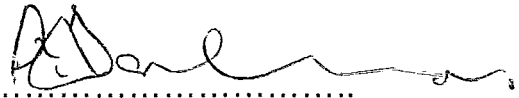
there is no evidence that the respondent obtained payment for allowing the occupation of the house. The only benefit has been to third parties who are not parties to the proceedings.

[10] We emphasise that the respondent had no right during the period before and after the operation of the Court Order referred to in para 3 of this judgment to allow occupation of the appellant's buildings and she could have required that the occupants be removed. Had there been damage to the house caused by the respondent or his occupants the appellant may have had a claim for trespass. But as best as we can tell from the evidence, the work done on the house by the occupants has probably resulted in it being in better condition than it was originally.

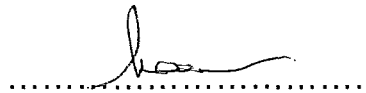
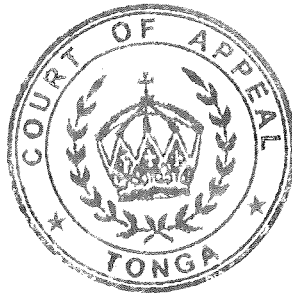
[11] For all the above reasons while we conclude that the appellant has not lost her right to remove the house and water tank, she is not entitled to any damages for its occupation. We add that should she wish to move the house and/or water tank she must act promptly.

[12] The appeal is dismissed. We have decided not to award costs to the respondent. His behaviour in allowing the occupation of house

and the demolition of a shop not belonging to him, in our view,  
disentitles him to costs.



**Salmon J**



**Moore J**



**Blanchard J**



**Tupou J**