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IN THE COURT OF APPEAL OF TONGA

APPEAL NO. 18/1990

CORAM: ROPER J.  
COOKE J.  
MORLING J.

BETWEEN: INTRACOR TRADING CO. (NZ) LTD - APPELLANT  
AND: MOLONAI FINAU - RESPONDENT

Hearing: 10 September 1990

COUNSEL: MR HOGAN for Appellant  
MR EDWARDS for Respondent  
MR WHITCOMBE as Amicus Curiae

Judgment:

JUDGMENT OF THE COURT

This is an appeal of some importance in which the question of whether the grant of a charging order over land is available in Tonga. Martin C.J. concluded that it was not, and this is an appeal from that decision.

There is no provision in Tongan law for the enforcement of judgment debts by way of charging order, but that deficiency could be made good by the application of the Charging Orders Act 1979, a statute of general application in force in England.

The Civil Law Act of Tonga gives authority for that course but "only so far as the circumstances of the Kingdom and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

Martin C.J. rejected submissions made by Mr Edwards to the effect that to apply the Charging Orders Act 1979 the Supreme Court, in enforcing an order, would be acting outside jurisdiction, in that only the Land Court can determine titles to land; and that the only orders the Supreme Court can make affecting land are those referred to in S.110 of the Land Act. That section merely states what dealings in land must be registered. Those conclusions of Martin C.J. have not been challenged and we endorse them.

However, Martin C.J. concluded that to apply the English provision would run counter to the provisions of the Land Act governing mortgages.

That was his reasoning:-

"The real problem arises because a charging order creates an interest in the nature of a mortgage. It does not create a legal estate in land, but it is in effect a compulsory equitable charge. This is made clear by section 3(4) of the English Act:

"(4)... a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand."

If the debtor defaults, an equitable charge, and therefore also a charging order, may be enforced by obtaining a court order to sell the property charged in order to raise the money secured by it.

Part VA of the Land Act makes detailed provisions for mortgages.

Section 91D states:

"91D A lessee of a registered lease may grant a mortgage over the whole or any part of the lands leased by him, provided that -

- (i) the approval of the Minister has been obtained ...;
- (ii) the mortgage deed is an assignation of lease in a form acceptable to the Minister;
- (iii) (is not relevant).

So under section 91D the Minister must approve the grant of any mortgage, and the form of it. And by section 91C the persons to whom mortgages may be granted are strictly limited - the government, the Bank of Tonga, and any other body specified by Privy Council (to date, Tonga Development Bank and International Finance Services Ltd). A valid mortgage may not be granted to any other person.

Section 91N provides for what may happen if the mortgagor defaults. The mortgagee may take possession of the land, and may either remain in possession or sublease it. He cannot sell it.

The grant of a charging order under the Charging Orders Act 1979 would be inconsistent with all these provisions of the Land Act. The Minister would have no right to approve it, or the form of it under section 91D; it could be granted to any judgment creditor, not restricted to the mortgagees approved under section 91C; and the remedy would be different from that provided by section 91N.

The grant of a charging order would conflict with many of the provisions of the Land Act relating to mortgages; and the recognition of any form of equitable mortgage over land would provide a means of evading the strict control of mortgages provided by that Act. For these reasons I conclude that the application of the English statute in Tonga is inappropriate."

It cannot be denied that the Land Act provides for strict control over mortgages to the extent that it specifies those who may be mortgagees and limits the remedies of a mortgagee in possession. S.91N(2) provides that

"he may either retain possession for the unexpired term of the mortgaged lease, or he may sub-lease the lands for the unexpired term of the mortgaged lease."

Despite the controls imposed by the Land Act we do not consider that the grant of a charging order would be in conflict with its terms, although the protection the order gives and the benefits it bestows may not be as wide as in other jurisdictions.

The Minister would not have the opportunity to approve the order or its form, but the Court would. The Land Act protects prospective mortgagors from unscrupulous mortgagees but that danger does not arise with a charging order, which follows a judgment of the Court. As for the remedies available to a charge holder, that would be a matter for the Court if enforcement proceedings were commenced. It is not for us to

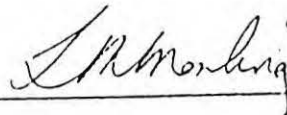
decide at this stage but the Court might restrict the remedies to those available to mortgagees, namely, the right to occupation or sub-lease for the remainder of the term of the lease, or he might authorise sale of the lease as was done in *O.G. Sanft & Sons v Tonga Tourist & Development Co. Ltd.* (Appeal 2/81).

We therefore allow the appeal, reinstate the charging order nisi made on the 21st March 1990 and make the order absolute.

The Respondent is ordered to pay costs to be taxed if not agreed.

  
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*Frederick G. Cooke.*  
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