IN THE COURT OF APPEAL OF TONGA App.No.6/1995.
NUKU'ALOFA REGISTRY Action No.640/1993.

ON APPEAL FROM THE LAND COURT OF TONGA

BETWEEN : KALANIUVALU FOTOFILI

APPELLANT

A N D : FREE WESLEYAN CHURCH OF TONGA
and THE KINGDOM OF TONGA

RESPONDENTS

Coram : Burchett J
Tompkins J
Neaves J

Miss Tonga for the Appellant
Mr. Tevita Fa and Mrs Taufaeteau for the First Respondent
Mrs Taumoepeau for the Second Respondent.

Date of Hearing : 28 May 1996.
Date of Judgment : 31 May 1996.

J U D G M E N T

This appeal concerns the legal effect of a lease and sub-lease of land originally leased for the purposes of the largest school of the Free Wesleyan Church of Tonga, but afterwards sub-leased for extensions to the runway of Fua'amotu Airport. The lease covered also a large area of land which has not been sub-leased. The appellant, whose hereditary estates include the land the subject of the lease, challenged in the Land Court the validity of the lease and the sub-lease.

The land was first leased for the purposes of the church school in 1925. The current lease is dated 8 November 1972, and is expressed to be made by "His Majesty King Taufa'ahau Tupou IV King of Tonga... called in this Deed the Lessor" and the Free Wesleyan Church of Tonga, so named in the Tongan language, "called in this Deed the Lessee". The document "Witnesseth that in consideration of the payment of the yearly rent that is recorded in this Deed ...the Lessor leases... all that piece of land leased to Free Wesleyan Church of Tonga hereinafter described... ." The land is then described, and a term is stated ending on 12 April 2010. There is a covenant to pay rent at T$1612.84 per annum. There is also provision for a rent review each five years, a power of determination being conferred on the Cabinet. An important clause provides : "And the Lessee further covenants for himself, his heirs and representative that he will not grant a sub-lease of, or transfer this lease without the consent of Cabinet beforehand obtained." Other clauses require the consent of the Minister of Lands to the erection of any building and give him power to remove buildings erected without consent. The lease is executed on behalf of the lessor and lessee. The Minister of Lands signed for the Lessor, as he was authorized to do by s.19(1) of The Land Act (c.132). So far as the lessee is concerned, the execution bears the seal of the President of Conference of the Methodist Church Tonga, which, the Court was told, is also known as the Free Wesleyan Church of Tonga. A second seal, placed over the attestation, is consistent with that, being the seal of Free Wesleyan Church Tonga. The lease was registered in the Registry of Leases of the Tongan Government in the Office of the Minister of Lands on 8 November, 1972.

The sub-lease was made on 11 April 1989 between Free Wesleyan Church of Tonga and Ministry of Civil Aviation. By it, the Church sub-leased to the Ministry part of the land until 10 April 2010 at T$5,000 per annum. The sub-lease was registered on 30 July 1993 in the Register of Sub-Leases.

The first question raised at the hearing was whether the Free Wesleyan Church of Tonga was capable of being the lessee of land. It was put that the Church is not a body corporate, and cannot be the lessee of land. But s.17 of The Land Act expressly declares:

"Religious bodies ... may subject to the provisions of this Act hold land upon lease".

There is a proviso prescribing a minimum number of adherents, which the membership of the Free Wesleyan Church of Tonga may be taken to exceed by far. Accordingly, the point is without substance.

However, it was argued that the manner of execution of the lease was irregular, in so far as it did not comply with the requirements of the Church's Constitution. But the Church has had the benefit of the lease for a great many years, and has executed the sub-lease as sub-lessor of part of the leased land. The Church would clearly be estopped, as against its sub-lessee, from relying on the alleged defect in the execution of the lease. So also is the appellant estopped, since he has received the benefit of the rent paid during many years in respect of the land, being part of his hereditary estates. This point also is without substance.

The next issue raised related to the sub-lease. It was said the Church was not entitled to use the land, or to allow it to be used, for other than its own religious purposes. However, s.18 of The Land Act confers this entitlement on the Church with " the prior consent of Cabinet". Furthermore, the section makes it clear that a failure to obtain Cabinet's prior consent does not automatically avoid the lease. The consequence of such a failure (by s.18(2)) is that "the Minister may with the consent of the Cabinet institute proceedings in the Land Court against [the Church] claiming therein the cancellation of its lease". No remedy is given to a person such as the appellant, but only to the Minister, and even in his case only with the consent of Cabinet. In the present matter, it is clear that no proceeding has been brought or authorized, and none is contemplated.

In any event, the learned former Chief Justice, Ward C.J., from whose decision the appeal is brought, pointed out that the lease itself, in this case, contains the provision allowing sub-letting, with the consent of Cabinet, which has already been set out in these reasons. Although no written consent was in evidence, he accepted, on the probabilities, as we read his judgment, that the sub-lease was executed after consent had in fact been given by the Cabinet.

Of course, if the land had been, or had included, a town site, "the prior consent of Cabinet" would have been required also under cl.108 of the Constitution, but the same finding of fact would have sufficed to prove compliance.

Finally, the Appellant contended that consent to the sub-lease could not be given without his concurrence. But his contention flies in the face of the language of s.18 of The Land Act, and in the face of the terms of the relevant covenant in the lease itself. Each

specifies that the power to give or withhold consent resides in Cabinet, and in Cabinet alone. So far as s.18 is concerned, this is consistent with the apparent purpose of the legislation, the maintenance of a measure of official control over the use of land leased to religious bodies or charitable or social organizations. There is no particular reason why a provision of this kind would have been inserted in The Land Act for the benefit of a lessor, who can, in general, protect himself by the terms of his lease.

For these reasons, each of the attacks launched against the validity of the lease and the sub-lease fails, and the appeal should be dismissed with costs. One further matter should be mentioned. It was suggested that the order made below requiring the appellant to pay half of the first defendant's costs should be varied. But this order, reflecting the appellant's success on a preliminary issue of standing to sue, was generous to him, rather than the reverse. It should not be disturbed.

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BURCHETT J

COURT OF APPEAL TONGA

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TOMPKINS J

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NEAVES J.