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BETWEEN : LORD LUANI

- **Plaintiff**

AND : LORD NUKU

- **First Defendant**

AND : YAN JIAN GROUP CO. LTD

- **Second Defendant**

AND : YAN JIAN TONGA LIMITED

- **Third Defendant**

Before Mr Justice M. D. Scott and Mr Assessor F. Tu'ifua

S. T. Fonua for the Plaintiff

S. Tu'utafaiva for the Defendants

J U D G M E N T

A. INTRODUCTION

[1] The two pieces of land which give rise to these proceedings are 4 acres, being part of Lot 90, Block 76/95 (hereinafter referred to as "Lot 90") and Lot 85 Block 76/95, an area of 8 acres, 1 rood ("Lot 85"). Another lot, Lot 89, although not in issue, abuts Lot 85 and will also be referred to. The three lots are all part of the Plaintiff's hereditary estate at Malapo and lie south of the Tuku'aho road. The three lots are highlighted in Exhibit 1.

[2] In January 2010 the situation on the three lots was as follows:

Lot 90

This tax allotment, previously held by one Sione Hafoka, had reverted to the Plaintiff's father, the late Lord Luani and was vacant.

Lot 89

This tax allotment, previously held by Sitili Tupouniua, was held by Lord Nuku who had acquired a sub-lease of the land in 2006, subject to a mortgage to the Westpac Bank, and who since then had been operating a quarry there, trading as "Island Quarry".

Lot 85

This tax allotment was held by Paula Kava and was apparently used for agricultural purposes.

[3] In about 2009 the Government of Tonga embarked on a major roads improvement scheme with the aid of the Chinese Government. The principal contractor was the Second Defendant. Substantial quantities of rock and crushed coral were required for the project and it appears that the First Defendant (Lord Nuku) who was a member of the Cabinet, undertook to assist to source these materials.

[4] In 2009 and early 2010 Lord Nuku met the late Lord Luani (who was then the Governor of Vava'u) on several occasions. On about 26 March 2010 Island Quarry applied for a 10 year lease of 4 acres (approximately half) of Lot 90 for a term of 10 years. The application was signed by Lord Nuku's daughter Tangi Kina 'Ahome'e on behalf of Island Quarry. The purpose "for which I wish to put to use the said property" is stated to be "commercial site". The application was

endorsed with the consent and statutory declaration by the late Lord Luani. A copy of the application is Document 2.

- [5] At about the time that the late Lord Luani and Lord Nuku agreed to apply for Cabinet's approval for the lease (see Section 33(1) of the Act) the sum of \$30,000 was paid to the late Lord Luani by Lord Nuku.
- [6] On a date unknown but probably in March 2010, Island Quarry entered into an agreement with the Second Defendant, a copy of which is pages 3 to 6 of the documents. Although the wording of the contract is somewhat vague it is accepted that insofar as it applied to Lot 90 its purpose was to permit the storage of mining equipment and the erection of accommodation for the miners. Lot 90 was not itself to be mined.
- [7] In about late March 2010 the Second Defendant entered into occupation of the 4 acre part of Lot 90.
- [8] On 12 May 2010 the late Lord Luani died. By operation of Section 38(1) of the Land Act (the Act), the Plaintiff (Lord Luani) succeeded to his father's title and estate on 13 May 2010.
- [9] On 19 May 2010 Cabinet, at a meeting attended by Lord Nuku, approved the grant of the lease applied for by Island Quarry (Document 31).
- [10] In the latter part of 2010 Lord Nuku met Paula Kava, the holder of Lot 85. An agreement was reached as follows:
- (a) Paula Kava would apply to the Minister of lands for his consent to the surrender of Lot 85, (see Section 72 of the Act).

- (b) With the agreement of Paula Kava's heir no claim to the allotment would be made in response to publication of the Section 54(2) notice;
- (c) Following the section 87 reversion of the lot to the estate holder (Lord Luani) Lord Nuku's son Faka'osifono Valevale would apply for the land for himself.
- (d) In exchange for Lot 85 Paula Kava was to be granted a tax allotment at Ha'ateiho.
- (e) Paula Kava received a "gift" of \$130,000 from Lord Nuku.

[11] In January 2011 Paula Kava submitted his section 72 application to the Ministry of Lands. On 24 February 2012 it was approved by Cabinet and on about 7 May 2012 the section 54 notice was published. There was no application by the heir and accordingly the allotment reverted to Lord Luani on 8 May 2013.

[12] On 24 January 2011, at about the same time as he submitted his section 72 application Paula Kava wrote to the Second Defendant. The letter (Document 14) states:

"I hereby certify that I have fully surrendered my legal right to my tax allotment which I had been registered at Malapo to Faka'osifono Valevale today, the 27th of January 2011."

In addition to being signed by Paula Kava and his son and heir the letter is also signed by Lord Nuku's son Faka'osifono Valevale who is described as "New Land Owner".

[13] On 31 January 2011 "Island Quarry (Under Noble Nuku)" entered into a second agreement with the Second Defendant (Document 9 - 12).

Once again, the wording of the agreement is somewhat unclear but it is not disputed that the principal terms of the agreement were:

- (a) Additional land, an "extension quarry" (at Lot 85) was to be made available to the Second Defendant to mine;
- (b) Lord Nuku by attached letter certified that the land of the extension quarry could be used legally;
- (c) The duration of the lease over Lot 90 would be extended to 15 years "with no increasing rental payment";
- (d) The extension quarry was to be leased for 20 years commencing on 31 January 2011;
- (e) The rental for the 20 year lease was TOP\$500,000 which was to be paid to Lord Nuku within 7 days of the agreement coming into force.

Lord Nuku signed the agreement on 31 January 2011.

[14] It is not in dispute that the Second Defendant entered onto Lot 85 and began quarrying there very shortly after receiving Paula Kava's letter and that it continued to extract and remove road building materials from the site until May 2013 when quarrying was forcibly halted by Lord Luani.

[15] On 10 August 2012 the Plaintiff wrote to the Minister of Lands (Document 49A). He pointed out that the approval of the lease application on 19 May 2010 followed the death of his father, seven days before. He also stated, correctly, that no lease in due form had ever been executed or registered. In these circumstances:

"I put forward to you Hon. Minister to kindly cancel this lease".

[16] On 16 August 2013 Cabinet rescinded the approval granted on 19 May 2010 (Document 63). It is not known by the Court how or why this decision was taken.

B. THE PLAINTIFF'S CLAIMS

[17] **Lot 90**

The Plaintiff's claim is that Lord Nuku deceived the late Lord Luani by failing to disclose to him that Lot 90 was not to be used for his own commercial purposes but was in fact to be used under his authority by the second and later the third Defendants. In the absence of a registered lease the Defendants could, at best, rely on a proprietary estoppel. In view however of the deceptive conduct of the First Defendant such equitable relief should be denied. In the premises the Plaintiff was entitled to possession and damages and/or mesne profits for having been unlawfully deprived of the lot.

[18] **Lot 85**

The Plaintiff's claim is that at no time had Lord Nuku ever acquired any interest in this Lot and that he had no authority to enter it or to allow the Second (and later the Third) Defendant to enter it and mine it. The Plaintiff (who already has possession of the lot) seeks damages against the Defendants jointly and severally, alternatively, mesne profits.

C. THE DEFENCES

[19] **Lot 90**

Mr Tu'utafaiva submitted that the evidence fell far short of establishing any misrepresentation by Lord Nuku to the late Lord Luani. It was not questioned that the late Lord Luani had signed the application for the grant of a lease to Lord Nuku, that he had at about the same time received from Lord Nuku \$30,000 and that Cabinet had approved the application. Citing *Faleafa v Faleafa* [2015] To. L.R 306 he argued that

the Plaintiff was estopped from entering Lot 90 for the period of the lease applied for and there were no grounds for an award of damages against any of the Defendants.

[20] **Lot 85**

Mr Tu'utafaiva suggested that the Second Defendant was entitled to rely on the First Defendant's representation that it could legally enter and mine Lot 85. He also pointed out that the Statement of Claim did not allege any unlawful conduct on the part of the Third Defendant.

D. WITNESSES

All the witnesses except Semisi Moala filed written briefs of evidence, the accuracy of which they confirmed.

[21] **Dowager Lady Luani**

The first time she came to know of the agreement between her husband and Lord Nuku was when he told her that Lord Nuku had paid him \$30,000. Her husband told her that part of Lot 90 was being given to Lord Nuku for his personal use. She admitted that she had seen Document 2 shortly after it was signed. She also conceded that she knew Lord Nuku was operating a quarry on Lot 89 and that he was looking for more rocks and aggregate. She maintained however that Lord Nuku had given the impression that he required Lot 90 not for commercial, but for agricultural purposes.

[22] Lady Luani told the Court that in July 2012 she went to Lot 90 "to find out who these people were". It was then that she was given a copy of the agreement between the First and Second Defendants and discovered that Cabinet had approved the grant of the lease after her husband's death. In cross examination however, she conceded that "the Chinese" had moved onto Lot 90 very shortly after Document 2 was signed (26 January 2010) probably in late March or early April.

Importantly, she also conceded that the late Luani who though physically unwell, was currently the Governor of Vava'u and in full command of his mental faculties and had been aware that "the Chinese" had entered on to Lot 90 probably five or six weeks before his death. So far as she was aware the late Lord Luani made no attempt to cancel the agreement reached with Lord Nuku.

[23] **Semisi Moala**

Semisi Moala is the Registrar of Lands and was also the late Lord Luani's land agent. It was he who drew up Document 2 on the late Lord Luani's instructions. It was approved by him before it was taken to Lord Nuku's office for signature. After it had been signed in Lord Nuku's office the late Lord Luani signed it and Semisi Moala took it to the Ministry of Lands.

[24] About two weeks after the application was filed the late Lord Luani asked Semisi Moala whether there were any "Chinese" with Lord Nuku when he visited him. The late Lord Luani "said he was dissatisfied with the agreement with Nuku as Nuku had already entered into an agreement with the Chinese as to the allotment". "The late Lord Luani was not satisfied with the lease. Only later he knew Nuku had worked with the Chinese. He said he would contact Nuku and would speak to the Minister (of Lands) if necessary after that".

[25] In cross examination Semisi Moala told the Court that when the late Lord Luani signed Document 2 he explained to Semisi Moala that Island Quarry was a Company owned by Lord Nuku. He also confirmed that the late Lord Luani never applied for the application for the lease to be cancelled.

The Plaintiff – Lord Luani

[26] During 2009 and 2010 the Plaintiff was studying overseas. He was not involved in his father's arrangements with Lord Nuku. Most of his evidence was therefore hearsay. While such evidence is admissible in the Land Court (see *Tafa v Viau* [2006] To. L.R 125, 136 line 500) the weight accorded to it is necessarily less than that given to first hand testimony. The Plaintiff did however tell the Court that no money has ever been received as specified in the annual rent for the land, that he refused Lord Nuku's request to allocate the reverted Lot 85 to Lord Nuku's son and that neither he nor his father had ever received any payment at all for the rock and coral excavated from Lot 85.

[27] **Paula Kava**

This witness's evidence was that Lord Nuku paid him \$130,000 at about the same time as he agreed to surrender Lot 85 with the intention of being granted a replacement lot at Ha'ateiho. In fact he never received the replacement. He confirmed signing Document 14 which had been prepared by Lord Nuku. He also confirmed writing Document 36 in April 2011 after "the Chinese" moved onto Lot 85 shortly after Document 14 was signed.

[28] **Uilou Samani**

Uilou Samani is a qualified surveyor. He surveyed Lot 85 in February 2017. His careful calculations revealed that approximately 85,009 cubic metres of limestone aggregate had been excavated and removed from Lot 85. No fault in the calculations was revealed.

[29] **Semisi Topui**

Semisi Topui told the Court that he acquired Lot 89, previously sub-leased by Lord Nuku, in a mortgagee sale in about September 2013 (see Document 65). He is now mining the land and is selling dust, crushed gravel and uncrushed rocks. In his written brief he explained in

detail how he had calculated that the value of the material excavated and removed from Lot 85 was approximately TOP\$5,556,000.00. After deducting expenses the net profit was calculated to be TOP\$3,380,335.00. Mr Topui was a model witness and I accept his evidence in its entirety.

Lord Nuku

[30] Lord Nuku was the only witness for the Defence. Mr Tu'utafaiva explained that he had attempted to locate witnesses for the Second and Third Defendants but had been unable to do so.

[31] Lord Nuku told the Court that the late Lord Luani was "well aware" that [Lot 90] was to be used in connection with the operating by the Chinese Technical Team of [Lot 89]. After the application for the lease was signed in March 2010 the late Lord Luani agreed that the Chinese Technical Team start preparing [Lot 90] for their use and occupation.

[32] In August 2013 Cabinet rescinded its decision of 19 May 2010 (see Documents 31 and 63). "I and Island Quarry were not given any opportunity to be heard before Cabinet rescinded its decision".

[33] As to Lot 85 the sequence of events as already set out was not disputed; "I had thought that the Plaintiff, being a fellow Noble of His Majesty would consent to grant the Paula Kava tax allotment to my son. Unfortunately, the Plaintiff did not agree".

E. CONSIDERATION OF THE ISSUES

[34] **Lot 90**

The statutory limitations on the availability of equity in Tongan land law were first explained in *Sanft v Tonga Tourist & Development'Co. Ltd* [1981 - 1988] To. L.R 26:

"The Privy Council wishes to emphasise that equitable principles can apply only to leasehold interests after they have been validly created".

As also explained by Martin J in *Veikune v To'a* [1981-1988] To. L.R 138, 140:

"*Sanft* does not say that the Defendant cannot avail himself of an equitable defence which does not create an interest in Land".

[35] Section 126 of the Act provides that:

"No lease ... until registered .. shall be effectual to pass or affect any interest in Land".

Section 56 provides that the consent of Cabinet must be obtained before a lease can be granted.

[36] The only direct evidence of what occurred in the discussions between Lord Nuku and the late Lord Luani is that of Lord Nuku himself. It seems highly unlikely that the late Lord Luani would not have known of the major road improvement project or of the leading role of the Chinese in that project. I find as a fact that the late Lord Luani was aware that the Second Defendant had entered and commenced operations on Lot 90 well before he passed away. He took no steps to halt those operations. I do not find that Lord Nuku misrepresented the position to the late Lord Luani in any material way. Given the general terms of the agreement between them, evidenced principally by the payment of \$30,000, the lodgment of Document 2 and the entry onto Lot 90 by the Second Defendant I find that an equity had arisen estopping the Plaintiff from evicting the Defendants from the land.

[37] In my opinion the occurrence of the death of the late Lord Luani on a date between the lodgment of Document 2 and Cabinet's approval of the application does not assist the Plaintiff. It will be noted that the application is by Lord Nuku (aka Island Quarry) and not by the estate holder, the late Lord Luani. In his statement the estate holder declares "there is no impediment or prejudice to this lease". There is nothing to suggest that any fresh impediment or prejudice arose between 12 and 19 May 2010.

[38] The death of the late Lord Luani was obviously well known to Cabinet and the failure of his son to make any request for the application to be stayed or cancelled could reasonably, in my view, be taken as his agreement to the application proceeding.

[39] Neither, in my view can Cabinet's subsequent decision to rescind its earlier approval assist. Cabinet's consent is a statutory requirement breach of which may affect the position in law, but not in equity. The situation would of course have been different if Cabinet had refused the application (see *Chalmers v Pardoe* [1963] 1 WLR 677). Clause 20 of the Constitution may also be borne in mind.

[40] There remains the unpaid \$500 per annum rent. The Defendants are entitled as I have found, to enjoy the use of this property for the 10 years commencing with the date of occupation (end of March 2010). But that right is subject to the obligation pay \$500 annually. Accordingly the Plaintiff is entitled to the payment of such sum by way of mesne profits or alternatively equitable compensation.

Lot 85

[41] It is clear that Lord Nuku's plan was to obtain a lease over lot 85 and then to permit the Second Defendants to mine it. This plan required not only the agreement of Paula Kava but also the consent of Cabinet to

the surrender, the agreement of the estate holder to the fresh grant, the agreement of the estate holder to the grantee's request for a lease and finally Cabinet's agreement to the request. Without the grant of a lease the mining of the Lot would have been illegal by virtue of the Land (Quarry) Regulations Cap 46.02.03. None of the necessary preconditions subsequent to Kava's agreement was satisfied and accordingly Lord Nuku, his invitees, servants or agents including the Second Defendant, were mere trespassers, liable in tort for their trespass.

[42] As pointed out by Mr Tu'utafaiva no particulars of the alleged wrongdoing of the Third Defendant are pleaded. Exhibit 2A however reveals that the Second and Third Defendants entered into two agreements between them in August 2013. Activities ceased on Lot 85 in May 2013. No evidence was led on behalf of the Second and Third Defendants and no attempt was made to construe the agreements which are apparently "home made" and not at all easy to understand. Mr Tu'utafaiva conceded that the Second Defendant could have no greater right to Lot 85 than did Lord Nuku. In my view neither had any right at all and nor did the Third Defendant. In my opinion neither Clause 14 of the Agreement of 22 December 2012 nor the second Clause 2 of the 20 August 2013 Agreement can assist the Third Defendant. (Exhibit 2A).

[43] In an action for trespass to land the Plaintiff is entitled, on proof of the trespass, to damages. In the case of mining the Plaintiff is entitled to damages as for trespass to his goods and the proper estimate of the damages will be:

"the value of them when gotten and when the Defendant took them away".

The Plaintiff has the right to the value of the goods without having to account for the expense of obtaining them since in obtaining them the Defendant committed a wrongful act for which he could not claim reimbursement.

"I am not sorry this rule is adopted; it will tend to prevent trespasses of this kind which are generally willful".

(Martin v Porter (1839) 5 M & W 351)

RESULT

Lot 90

Upon payment forthwith by the First Defendant of all arrears of rent due under the lease applied for on 26 March 2010 and providing the annual rental payments are made on due date, the Plaintiff is restrained from removing the Defendants from Lot 90, until 31 March 2020.

Lot 85

There will be judgment for the Plaintiff in the amount of TOP\$5,556,000.000 (five million, five hundred and fifty six thousand Tongan Pa'anga) against the First, Second and Third Defendants jointly and severally. This sum awarded will attract interest at the rate of 10% from the date of this judgment until satisfaction.

DATED : 5 MAY 2017


M. D. Scott
J U D G E