

IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 03 of 2018

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#1

15/10/18

BETWEEN: MACK-LINE AFU

Plaintiff

AND : VILIAMI PASIKALA

First Defendant

FE'ILOAKI TOHI FOTUKAVA

Second Defendant

HON. MINISTER OF LANDS

Third Defendant

BEFORE THE PRESIDENT PAULSEN AND ASSESSOR

Counsel: Mr. W.C. Edwards Jnr for the plaintiff  
Mr. S Fonua for the first and second defendants  
Mr. 'A. Kefu SC for the third defendant

Date of Hearing: 28 September 2018

Date of Ruling: 15 October 2018

## JUDGMENT

### The claim

- [1] Mekinoti Afu (Mekinoti) held a town allotment at Fasimoeafi named Tolona e Loa. This action arises because Mekinoti's sister, Saane Afulikutapu Pasikala (Saane), held a registered lease over the allotment for a term of 50 years but, notwithstanding the

term of the lease, entered into an agreement with Mekinoti that the lease would terminate upon her death. Saane predeceased Mekinoti. Saane's husband and administrator, Viliami Pasikala (Viliami), with the consent of Cabinet transferred the lease to the second defendant, Fe'iloaki Tohi Fotukava (Fe'iloaki). Mekinoti wrote to the Minister asserting that the lease had terminated but did not challenge the lease by Court proceedings during his lifetime. Mekinoti has now died. Mack-Line Afu (Mack-Line) is Mekinoti's heir and he has applied for the allotment. He seeks a declaration that the lease be cancelled.

#### **The course of the hearing**

- [2] When the case came on for hearing on 24 September 2018, I was advised that the Minister wanted to file a late amended pleading. Mr. Fonua wished to file a response on behalf of Viliami and Fe'iloaki. I was also advised that there were settlement discussions and good prospects of a resolution. I delayed the start of the hearing to allow Mr. Fonua to file an amended pleading and also to allow the parties to continue their discussions.
- [3] On 25 September 2018, Counsel advised me that there was no settlement but that the case could be decided on agreed facts and issues. I expressed reservations about this approach, specifically because of the possibility that Counsel might not agree sufficient facts or identify the relevant issues to allow for a just determination to be made. Notwithstanding those reservations, Counsel were confident that they should proceed in this manner. Agreed facts and issues were filed. On 28 September 2018, I sat with a Land Assessor, Mr. Toumo'ua, when Counsel presented their submissions.

#### **The agreed facts**

- [4] I set out below the agreed facts. I have added some non-contentious material for clarity.
- [5] The agreed facts are:

- 1 The Plaintiff Mack-Line Afu is a Tongan subject by birth, and was born in Suva, Fiji on 17 March 1975. He is the eldest legitimate son of Mekinoti Afu ('Mekinoti') and his wife Telesia Kasinga Afu ('Telesia'). Mekinoti and Telesia were married in Fiji on 16 January 1974.
- 2 Mekinoti passed away on 2 April 2017. Mekinoti is the brother of Saane Afulikutapu Pasikala (nee Afu) ('Saane'), who was the First Defendant's late wife.
- 3 Saane was married to the First Defendant on 19 November 2006. The First Defendant was the third husband of Saane. He lives in the house situated on the land in dispute. Saane died on 15 April 2009.
- 4 Saane first married Koloamatangi, and they had four children of the marriage, namely:
  - (a) 'Anaseini Tupou Malupo (nee Koloamatangi), a female;
  - (b) Palu Koloamatangi, a male;
  - (c) 'Alani Koloamatangi, a male; and
  - (d) Tevita Koloamatangi, a male who has two children living in Vaini.
- 5 Koloamatangi then died, and Saane Afu married Lau'ia Fotukava, and they had two children of the marriage, namely:
  - (a) Fe'iloaki Tohi Fotukava, a male, who is the Second Defendant; and
  - (b) Sitela Fotukava, a female.
- 6 Lau'ia Fotukava then died, and Saane Afu married the First Defendant, Viliami Pasikala on 19 November 2006.
- 7 On 4 February 1965 Hosea Afu was registered as the landholder of a town allotment located at Fasimoeafi, and he was issued a Deed of Grant, number 125/34 with a size of 0A.1 R.10.1P, and was named "Tolona e Loa".
- 8 Hosea decided to lease a portion of the town allotment to Saane.

- 9 On 23 November 1987, Cabinet approved the lease application by Saane, to lease 505.9 square metres 20 perches of Hosea's town allotment, for a period of 50 years for residential purposes, at an annual rent of \$5.00, and to be effective from the date of registration.
- 10 On 22 January 1988 the then Minister of Lands (Minister) directed that a survey be conducted and a Deed of Lease be produced and registered.
- 11 On 12 June 1994, Hosea died.
- 12 On 23 September 1994, Mekinoti was registered as the landholder of the town allotment.
- 13 On 23 November 1994 a Deed of Lease, No.5620 was registered in the name of Saane, to lease an area of 505.9m<sup>2</sup> (0a. 0r. 20p) of the town allotment, now held by Mekinoti for a period of 50 years, with an annual rental of \$5.00 per annum.
- 14 Mekinoti was not aware of, nor did he consent to the lease before it was registered on 23 November 1994.
- 15 Mekinoti became aware of the lease after Saane built a house on the leased land.
- 16 Mekinoti did not take any legal action to cancel the lease.
- 17 On the 30 June 2008 Saane and Mekinoti entered into an agreement regarding the leased land.

At this point I add that the relevant term of the agreement for present purposes is clause 4 which reads as follows:

On the date of death (deceased) of [Saane] the Deed of Agreement declares the lease of [Saane] is terminated at the same time and the land comprised in Lease No. 5620 shall revert to [Mekinoti] irrespective of the length of time of the unexpired term of the lease and none of the heirs or representatives of [Saane] shall make any claim to the lease.

- 18 On 6 April 2009, Saane wrote to Mekinoti to cancel their agreement regarding the leased land.
- 19 However, Saane's letter of 6 April 2009 did not lawfully cancel the agreement between Saane and Mekinoti dated 30 June 2008.
- 20 By the letter dated 6 April 2009, Saane did not want to cancel the lease number 5620, and intended that the lease continue beyond her death to be held by her heir.
- 21 On 15 April 2009, Saane died.
- 23 The lease was then transferred to the First Defendant in accordance with Letters of Administration issued by the Supreme Court on 26 July 2009.
- 24 On 1 September 2010, the transfer of the lease from Saane to the First Defendant was registered.
- 25 On 29 September 2010, Cabinet approved the transfer of the lease, under Cabinet Decision number 928 of 29 September 2010, from the First Defendant to the Second Defendant.
- 26 On 9 August 2011, Mekinoti wrote to the Minister to request to increase the annual rent from \$5.00 to \$7,000.00.

At this point I add that Mekinoti also stated in his letter to the Minister as follows:

The agreement between Mekinoti Laini Afu the Lessor [sic] and Saane Afu the Lessee to terminate the lease after death as according to the letter is now due (letter attached). The Lessee died on the 15<sup>th</sup> of April 2009 and the lease should terminate according to the agreement.

- 27 On 26 September 2011, the Minister received Mekinoti's letter of 9 August 2011.
- 28 On 29 September 2011, the transfer of the lease from the First Defendant to the Second Defendant was registered.



- 29 On 7 February 2017, Mekinoti wrote to the Minister requesting that the lease not be transferred to anyone again.
- 30 On 2 April 2017, Mekinoti died.
- 31 On 23 May 2017, Counsel for the Plaintiff wrote to the Minister providing a copy of the Agreement between Saane and Mekinoti, and requested that the lease number 5620 be cancelled.
- 32 On 9 August 2017, the Plaintiff lodged his claim to the town allotment.
- 33 The Plaintiff is yet to be registered as the landholder of the town allotment.
- 34 On 8 November 2017, Counsel for the Plaintiff again wrote to the Minister providing another copy of the Agreement between Saane and Mekinoti.

**The statement of issues**

- [6] The parties identified four issues for determination. They were as follows:

Issue 1 – Was the registration of the lease number 5620 in the name of Saane Afu on 23 November 1994 null and void? If the lease was null and void that is the end of the matter as far as the validity of the lease is concerned. This is subject to the time bar in issue 4 below.

Issue 2 – If, on the other hand, the lease was valid the next issue to decide is whether or not the written agreement on 30 June 2008 and its cancellation on 6 April 2009 have any impact on the lease so that the lease is cancelled.

Issue 3 – [Do] the errors in the indenture invalidate the lease?

Issue 4 – Is the plaintiff barred from bringing this action? If he is time barred then the defendants get the relief that they pleaded for.

- [7] The parties also agreed that if the lease is to be cancelled Mack-Line is to have the dwellinghouse on the land but if the lease is valid then Viliami and Fe'iloaki are to have the dwellinghouse.

- [8] During the presentation of submissions, Counsel all agreed that three of the four issues did not require determination by the Court. It was accepted, on the authority of *Lopeti v Lopeti and ors* (Unreported, Court of Appeal, AC 15 of 2017, 26 March 2018), that the lease was registered unlawfully (as there was no Cabinet consent to a lease between Mekinoti and Saane) but that any action to challenge the lease on that basis was time barred under s. 170 of the Land Act. This dealt with issues 1 and 4. As far as issue 3 is concerned, it was accepted that errors identified in the indenture transferring the lease to Fe'iloaki did not invalidate the lease. That left only issue 2 for determination.

#### **The parties' submissions**

- [9] I was referred to s. 130 of the Land Act. It is concerned with the method of surrender of a registered lease. It reads:

#### **130 Method of surrender of lease**

- (1) The surrender of a lease or of a sub-lease shall be effected by the Minister endorsing upon the duplicate lease (or sub-lease as the case may be) filed in his office the word "surrendered" together with the date of the surrender and such endorsement shall be signed in the presence of the Minister by the lessee and holder of the estate or allotment where the intended surrender is of a lease or by the sub-lessee and sub-lessor where the intended surrender is that of a sub-lease. The Minister shall also affix his signature and seal of office to such endorsement.
- (2) Where the intended surrender is of a lease the Minister shall likewise endorse upon the lease to be produced by the lessee for the purpose a memorandum of the fact and date of such surrender.
- (3) Where the intended surrender is that of a sub-lease the Minister in addition to the endorsement upon the duplicate sub-lease specified in subsection (1) of this section shall endorse upon the sub-lease to be produced by the sub-lessee for that purpose a memorandum of the fact and date of such surrender and shall make a similar memorandum upon both the duplicate originals of that instrument under which the grantor of the sub-lease holds the lands thereby sub-

let and such grantor shall produce to the Minister the duplicate of such instrument in his possession for the purpose of having such memorandum endorsed thereon.

- [10] Mack-Line's claim is based upon the agreement between Mekinoti and Saane of 30 June 2008. Mr. Edwards argued that the agreement was valid and that Mekinoti had applied to the Minister following Saane's death, and before the lease was transferred to Fe'iloaki, that the lease be terminated. Whilst accepting that upon her death Saane could not surrender the lease in accordance with s. 130, Mr. Edwards argued that the requirement to do so fell upon Viliami as her administrator. He submitted that as Viliami had chosen not to surrender the lease the Court should give effect to the agreement and cancel the lease.
- [11] Mr. Fonua argued that the agreement was incapable of performance in accordance with s. 130 and that in the absence of fraud or serious misconduct the Court has no power to interfere with a registered leasehold interest. He did not provide any authority for the second proposition.
- [12] Mr. Kefu argued that s. 130 is no bar to the cancellation of the lease as the agreement was enforceable against Viliami as Saane's next of kin and administrator. He submitted that the Minister was wrong to transfer the lease to Fe'iloaki and the lease should be declared cancelled.

### **Discussion**

- [13] In their submissions Counsel strayed beyond the terms of issue 2 but no one took any objection to that. In my view, the submissions of Counsel require me to consider five questions which I set out under the headings below.

#### *Issue 1 – Did the lease terminate upon Saane's death?*

- [14] No party argued that the agreement between Mekinoti and Saane took effect as a variation of the lease. In my view, they were correct not to do so. The Land Act does contemplate the variation of registered leases (see for instance s. 131 and compare it with s. 104 in relation to variations of mortgage).



- [15] There is authority in *Fangupo & anor v Snap Contracting Corporation and anor* (Unreported, Land Court, LA 7 of 2011, 14 November 2014, Scott P) that an agreement to vary a covenant to pay rent in a registered sublease would be effective if the variation was registered. Scott J considered that there was nothing in the Land Act to exclude the registration of such a variation. I consider that view is incorrect. The requirement that Cabinet consent to the grant of a lease, that all leases are signed by the Minister in the name of His Majesty and are in a prescribed form, along with the absence of any provision authorising variations or their registration (amongst other factors) indicate that variations of registered leases may only be effected by surrender and the re-grant of a new lease containing the terms as varied. I note that such an approach is consistent also with common law (*Jenkin R Lewis & Son Ltd v Kerman* [1970] 3 All E.R. 414)
- [16] It is not necessary for me to finally decide this particular issue. The parties all proceeded on the basis that the agreement was a personal collateral agreement between Mekinoti and Saane and that what Saane had agreed was that her leasehold interest would be surrendered upon her death.
- [17] As the parties recognised, the difficulty with this approach is that the surrender of a registered lease can only be effected in the manner set out in s. 130. I have set out s. 130 earlier in this ruling. It is expressed in prescriptive terms. It was not open to Mekinoti or Saane to contract out of the requirements of s. 130 (Bennion, *Statutory Interpretation*, 2<sup>nd</sup> Ed at pp. 37-39) nor could the Minister cancel the lease on the application of Mekinoti alone.
- [18] It follows that the lease did not terminate on Saane's death.
- Issue 2 – What rights did the agreement confer on Mekinoti?*
- [19] The fact that the lease did not terminate automatically on Saane's death does not mean, as Mr. Fonua submitted, that the agreement 'does not exist'. It is arguable that a term might (I put it no higher than that) be implied that the parties (including their representatives) would co-operate to do all that was necessary to give effect to their

bargain (Chitty on Contracts, 29<sup>th</sup> Ed, Vol 1 at 13-011) including taking such steps as were required to surrender the lease to bring about its termination according to law. It might also be that an action could be formulated on estoppel principles but no party argued for that.

[20] Such rights as Mekinoti had would only be enforceable by action. The law of contracts, upon which such an action would be based, provides a framework within which parties may, if they choose to do so, enforce voluntary agreements through third party enforcement mechanisms, such as the Courts (Harris, Campbell and Halson, 'Remedies in Contract and Tort,' 2<sup>nd</sup> Ed, at 7).

[21] Upon Saane's death, an action might have been brought on the agreement by Mekinoti against Viliami, who claimed the lease as Saane's administrator. In Chitty (supra) at 20-005, the learned authors state that 'in principle, the personal representatives of a contracting party are bound, so far as his assets will extend, to perform all his contracts, although not named therein.' This principle has been held to bind a personal representative to convey land subject to an enforceable contract for sale. Similarly, the Court has ordered specific performance against a personal representative of a deceased who had agreed to accept a lease of land (Halsbury's Laws of England, Fourth Edition, Vol 17, at 1513 and 1525).

[22] However, Mekinoti did not bring an action during his life-time. This is despite the fact that he wrote to the Minister asserting that the lease had terminated on 9 August 2011 and did not die until 2 April 2017 (almost 6 years later).

[23] The failure by Mekinoti to bring an action meant that any rights he had under the agreement remained latent.

*Issue 3 – What rights does Mack-Line have under the agreement?*

[24] It is trite that a contract cannot (as a general rule) confer rights or impose obligations on any person other than the parties to it. Mack-Line was not a party to the agreement and cannot enforce it in his own right.

[25] There is no evidence that Mack-Line obtained letters of administration entitling him to bring an action on the agreement in that capacity (*Wight v Wight* (Unreported, Court of Appeal, AC 3 of 2018, 7 September 2018)).

[26] Mack-Line has no right to enforce the agreement.

*Issue 4 – What was the Minister's duty upon receiving notice of the agreement?*

[27] There is nothing in the Land Act which conferred on the Minister the power to cancel the lease upon the application of Mekinoti alone.

[28] Mr. Edwards and Mr. Kefu appeared to argue that upon receiving notice of the agreement from Mekinoti the Minister could not register the transfer of the lease from Viliami to Fe'iloaki. They did not refer me to any authority or legal principle to support the submission. I cannot think of any.

[29] Specifically, I do not consider that in registering the transfer of the lease (to which Cabinet had given its consent) the Minister exercised a discretion giving rise to an obligation to make enquiries (*Schaumkel v Aholelei* (Unreported, Court of Appeal, AC 14 of 2012, 17 April 2013) and *Mone & or v Pane & ors* (Unreported, Court of Appeal, AC 13 of 2009, 9 September 2009)).

[30] Furthermore, if such a duty existed there is no evidence before me in the agreed facts from which a finding could be made that the duty was breached.

[31] In registering the transfer of the lease to Fe'iloaki the Minister was not acting in breach of any duty owed to Mekinoti or his successors in title.

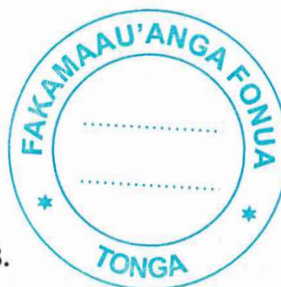
*Issue 5 – Can the agreement now be enforced against Fe'iloaki?*


[32] Fe'iloaki was not a party to the agreement and it cannot be enforced directly against him. I do not accept Mr. Fonua's broad submission that in the absence of fraud or serious misconduct the Court has no power to interfere with Fe'iloaki's leasehold interest but the agreed facts do not identify a basis for any challenge to his title to the lease.

**Result**

- [33] Upon what is before me there is no basis to declare void or to cancel the lease at the suit of Mack-Line. Mack-Line's claim is dismissed.
- [34] This is an interim judgment in the sense that if the parties are unable to agree I will need to hear further from Counsel about what other orders should be made consequent upon this ruling.
- [35] I direct Counsel to file memoranda within 14 days setting out any further orders required including as to costs. I shall then arrange a hearing for Counsel to speak to their submissions.

NUKU'ALOFA: 15 OCTOBER 2018.



  
O. G. Paulsen  
PRESIDENT

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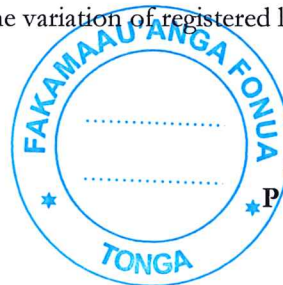
Third Defendant

Counsel: Mr. W.C. Edwards Jnr for the plaintiff  
Mr. S Fonua for the first and second defendants  
Mr. 'A. Kefu SC for the third defendant

Minute of President

- [1] I am embarrassed to see that there is an error in the ruling issued today which I correct pursuant to O.28 Rule 5. The second sentence of paragraph 14 should read "The Land Act does not contemplate the variation of registered leases...."

NUKU'ALOFA: 15 OCTOBER 2018.



  
O. G. Paulsen  
PRESIDENT