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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 6 of 2020

BETWEEN:

[1] PELENAISE KATRINA MALIA KAUKAULOKA
[2] SOSAIA TALA'OFA MEI LANGI KAUKAULOKA KUPU Plaintiffs

-and-

LUNA'EVA & SONS COMPANY LIMITED Defendant

REASONS FOR JUDGMENT

BEFORE: PRESIDENT WHITTEN QC LCJ
Counsel: Mr W.C. Edwards SC for the Plaintiffs
Mr S. Fonua for the Defendant
Date of trial: 23, 24 November 2020
Date of judgment: 24 November 2020

Introduction

1. In this proceeding, the plaintiffs seek an order for the eviction of the defendant from a town allotment on Fatafehi road in Pahu, Nuku'alofa. They also seek an order payment in the sum of TOP$72,000 for damages by way of mesne profits for the defendant's use of the town allotment until the defendant vacates it.

2. At the conclusion of the evidence and closing submissions, I delivered judgment ex tempore. This is the transcript of my reasons for decision, edited only as to form and not substance.

Background

3. There is no dispute about the background facts as set out in the Statement of Claim. The first plaintiff, Pelenaise, was married to Fonua Kaukauloka on 27 August 1996.

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The second plaintiff, Siosaia, was born on 1 January 2001 and is the male hejr of Fonua and Pelenaise.

4. Fonua was born on 8 July 1971 as was the heir of Siosaia Kaukauloka (Siosaia senior) and Tamelita. Siosaia senior was the registered holder of the allotment on which he erected a three-bedroom dwelling house. In the early 1990s, he and his wife Temaleti travelled to the United States of America and left their son Fonua in possession of the allotment. Fonua and Pelenaise married here and made the town allotment their home. Siosaia senior died in the United States in 2012. After his death the allotment was not the registered by the heir Fonua or the widow Temelita.

5. Fonua died in 2014. Pelenaise, as his widow, continues to occupy and reside on the allotment with her son the second plaintiff here, Siosaia. On 2 June 2017, Siosaia applied for registration of the allotment in his name as heir and occupier. On 20 March 2020, the allotment was registered in Siosaia's name.

6. The defendant company, Luna'eva, is the owner of a gas station situated on Fatafehi Road adjacent to the town allotment the subject of this proceeding. The plaintiffs allege that in September 2017, the defendant requested Pelenaise to allow the caretaker or guard employed by the defendant at its gas station to occupy and use the allotment as accommodation and a watch post for the gas station. It was alleged that no fixed rental was agreed but that Pelenaise was 'given to understand' that she would be paid what money she required from time to time and when she needed it. Siosaia agreed and allowed the home to be occupied and used by the defendant's guard for the said purpose.

7. In February 2018, cyclone Gita damaged the dwelling house on the allotment. With the plaintiffs' consent, the defendant started removing the building and cleared the allotment for storage and a sale yard for building materials. A container was placed on the allotment as shelter for the caretaker. In about January 2019, the defendant fenced the allotment for the protection of its building materials stored on site.

8. The plaintiffs allege that on 13 May 2018, Charles Steward Mafi ("Mafi"), a shareholder and director of the defendant company and another man by the name of Sione Muti Palu attended at the plaintiff's residence at 'Amaile and asked for a thirty-year lease of the allotment for $50,000. The plaintiffs allege that Pelenaise declined that request. The discussions alleged led to Mafi increasing the offered price for the lease from $50,000 to $80,000. Again, it is alleged that Pelenaise refused that offer to lease the allotment.

9. The plaintiffs also allege that on or about 17 May 2018, Pelenaise's car broke down and the defendant offered her a vehicle from its sale yard at Veitongo valued at $40,000 as a deposit for the lease of the allotment. That offer was also declined by Pelenaise.

10. The plaintiffs say that between September 2017 and early 2020, they received payments from the defendant on account of rent totaling approximately $30,000.

11. In their Statement of Claim, the plaintiffs also allege that at the meeting on 13 May 2018, the defendant's representatives tried to coerce and force the plaintiff to agree to lease the allotment to the defendant by claiming that they had advanced $40,000 to the plaintiffs and that they had spent US$20,000 on drawing up plans for the development of the allotment, that they would not vacate the allotment as they had an oral agreement to lease the town allotment and that they required compensation from the plaintiffs. The date in paragraph 29 of the Statement of Claim was obviously wrong. Any such discussions most likely occurred sometime later on.

12. It is common ground that on 4 May 2020, the plaintiffs caused a notice to vacate the allotment to be served on the defendants. On 7 May 2020, Mr. Fonua, on behalf of the defendant, wrote to Mr. Edwards, on behalf of the plaintiffs, in response and advised, relevantly, that there was an oral agreement between the parties to lease the land for 30 years, the defendant has already paid $47,000 to the plaintiffs and had expended approximately $25,026 on the allotment, there were more expenses to be added to those figures and the defendant would not vacate the allotment.

13. The plaintiffs' claim for mesne profits is calculated as follows:

    (a) from September 2017 to the commencement of proceedings (which was 15 May 2020), the defendant occupied and used the allotment for its business without payment of rent to the plaintiffs;

    (b) at the rate of $750 per week from 1 October 2017 to 15 May 2020 which is a period of 136 weeks, which totals $102,000;

    (c) from that, they deduct the sum of $30,000 they had received from the defendants leaving a balance of $72,000 owing;

    (d) in addition, the plaintiffs claim further damages of $750 a week from 16 May 2020 until the defendant vacates the allotment.

14. The defendant initially failed to file a defence in the time required by the Rules. As a result, the matter was listed for a formal proof hearing on 14 August 2020. On that day, Mr. Fonua appeared and sought leave for the defendant to file a defence and counterclaim out of time. In support of the application, Mr Mafi swore an affidavit on 22 July 2020. Apart from his explanation for the defendant not having filed a defence in time. Mr Mafi deposed, relevantly, that:

    (a) he was the one involved in negotiating to lease the allotment and he had knowledge of those dealings;

    (b) the defendant had spent approximately $74,576.20 on payments to the plaintiffs and developing the allotment for its business purposes;

    (c) the defendants disputed the plaintiffs' claims;

    (d) in August 2018 or thereabout, he and Sione Muti Palu had a meeting with the plaintiffs in which he requested a lease of the town allotment for 30 years;[1]

[1] Paragraph 10.

(e) he offered the plaintiffs $80,000 as consideration money;[2]

(f) the plaintiffs agreed to lease the land to the defendants;[3]

(g) at some later time, he and Mr Palu attended a meeting with the plaintiffs at the Ministry of Lands to "process the lease" at which the Ministry representatives, Semisi Moala and 'Sulia', told them that the lease application could not be processed until 'achieved the legal age'. Mr Mafi said he did not know how old Siosaia was at the time;[4]

(h) he followed up the application for lease but was advised by the plaintiffs that they were waiting for the Ministry to advise them;[5]

(i) in September 2018, the plaintiffs started asking him for "consideration money" and that from then to February 2020, the defendant had paid the plaintiffs a total of $49,550 in cash. A schedule of those payments, their dates and cheque or voucher numbers was exhibited to his affidavit;[6]

(j) in February 2020, the defendants stopped paying the consideration money to the plaintiffs because the defendant "had not got the deed of lease yet" and he understood that the plaintiffs were upset about the cessation of payments;[7]

(k) the defendant performed the following works on the land:[8]

    (i) on 7 December 2018, it knocked down the dwelling house and rock filled the land;

    (ii) on 8 December 2018, it placed a container on the land; and

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[2] Paragraph 11.
[3] Paragraph 12.
[4] Paragraph 14.
[5] Paragraph 15.
[6] Paragraph 16.
[7] Paragraph 17.
[8] Paragraph 18.

(iii) on 19 December 2019, it put up a fence, of which photographs were exhibited;

(iv) the total cost of those works was $25,026.20. Copies of records of those expenses were exhibited as was a copy of a plan that had been drawn up for proposed future development of the land;

(l) when those works were being carried out, the plaintiffs never objected or tried to stop the defendant from performing them;[9]

(m) the only objection they received was the letter on 4 May 2020 demanding that the defendants vacate the property; and

(n) on or about 8 July 2020, a Chinese national by the name of Mr Tsai saw him at Malapo and said that he had paid $70,000 to the plaintiffs to lease the same allotment. Tsai asked him how much he would pay to end the defendant's claim to lease the land. Mr. Mafi told Tsai that if he paid $400,000, the defendant would be happy. Tsai said that was too much and that he was willing to pay $80,000;[10]

15. On 22 July 2020, with its application for leave to file a defence and counterclaim out of time, the defendants filed its proposed Statement of Defence and Counterclaim. Most of the pleadings reflects and confirms the history set out by Mr. Mafi in his affidavit. Otherwise, and relevantly, the defendant's pleaded case may be summarized as follows:

(a) it denied that the plaintiffs are entitled to an order for the eviction of the defendant from the allotment because the plaintiffs agreed to lease the land to the defendant;

[9] Paragraph 19.
[10] Paragraph 21.

(b) the plaintiffs allowed the defendant to take possession of the land and consented to the defendant developing it;

(c) they rely on the agreement to lease and payments of consideration money to the plaintiffs;

(d) it simply denied the plaintiffs' claim for mesne profits on the basis that the plaintiffs agreed to the defendants taking possession of the allotment pursuant to their agreement to lease;

(e) that in or about August 2018, the defendant requested the plaintiffs to lease the land for 30 years for $80,000 and the plaintiffs agreed;[11]

(f) they went with the plaintiffs to the Ministry of Lands to start the lease process but were advised it could not be done until Siosaia was of legal age;

(g) it kept requesting the plaintiffs to get the lease completed but without success;

(h) the defendant has spent a total of $74,576.20 in consideration money paid to the plaintiffs of $49,550 and other works on the allotment;

(i) the defendant still wanted to lease the land;

(j) the plaintiffs are estopped from evicting the defendants; and

(k) by way of counterclaim, the defendants sought orders for specific performance of the agreement for lease including that the plaintiffs cooperate and sign all required documentation to complete the lease; alternatively, that the plaintiffs pay the defendants the sum of $74,576.20.

Evidence at trial

16. Turning then to the plaintiffs' evidence.

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[11] From paragraph 37 and following.

Pelenaise Kaukuloka

17. In her brief of evidence, Pelenaise set out the background and history of her family's connection to the land in question. She explained how after the death of her husband, she tried to register the town allotment in her name as a widow but was told that the registration of the allotment in the name of her late husband (referred to as 'Vaha') was not completed and that she would have to wait until Siosaia was 16 years of age so that he could apply for registration of the allotment in his name.

18. Siosaia was born on 1 June 2001. Therefore, from the earliest dealings between the parties in September 2017 (on the plaintiff's version), Siosaia was already 16 years of age. Shortly after he turned 16, he applied for registration of the allotment in his name. On 20 March 2020, the allotment was registered in Siosaia's name.

19. Pelenaise continued in or about September 2017, the defendant's security guard at the neighbouring gas station asked her if he could occupy and use the town allotment as a watch post for the defendant's gas station. No fixed rent was agreed, but she stated that she "was given to understand that she would be paid what money she required from time to time when she needed it". On that basis, she said that she and Siosaia agreed to let 'them' (meaning the defendant and its security guard) use the property.

20. Pelenaise recounted that on Saturday, 12 May 2018, Charles Mafi and Sione Muti Palu came to their home and asked her to give the defendant a 30 year lease of the allotment for $50,000. She noted that the allotment was not then registered in her name or her son's who was present at the meeting. She stated that she refused the request. Then, Mafi and Palu asked her whether she would consider granting the company a lease if they increased the amount from $50,000 to $80,000. She also refused that request. Pelenaise said that at the meeting, Mafi had fallen asleep, that he smelled strongly of liquor and she believed he was intoxicated.

21. She also gave evidence about her car breaking down and the defendant's offer of a vehicle worth $40,000 as part of the consideration money for the agreement for the lease. Again, she said she refused that offer.

22. Pelenaise made one correction to her brief of evidence. She provided a supplementary brief of evidence in which she detailed that from September 2019 to approximately March or April 2020, she received "advances on account of rent" from the defendant totaling not $30,000 but $39,300. She set out a table of various amounts claimed to have been paid by the defendant and a reconciliation of those and her reasons for requesting the various payments she had received which included financial hardship, payments for school fees and children's school needs, needs at the home, at one stage, Vaha's mother died and they tried to go to the USA, and also for a final payment on a vehicle she bought. A separate table identified certain dates, voucher numbers and amounts claimed to have been paid by the defendant which Pelenaise described simply as "did not receive this", totaling $10,250.

23. During cross-examination, Pelenaise was asked about the circumstances leading to the requests of the defendant for payments. She said there had been no requests for monies before September 2018, that is, about a year after she said she had the discussion with the defendant's security guard about the use of the land for his accommodation, because she said she did not need funds before then. She repeated that the security guard informed her that if she was ever in need of any money, she could request the defendant for it. She also added that Sione Muti Palu was also at the September 2017 meeting and it was he who asked permission to use the land for the security guard and told her that if she was ever in need of money, she could simply ask the defendant for it. When asked how she was "given to understand" that if she needed money, she was to inform the guard (who she named as Samua Kafoa) and he would contact the defendants, she added that it was both Sione Palu and the security guard who approached her in September 2017 with the arrangement for the defendant's use of the allotment.

24. When was asked why she didn't stop the defendant from performing the works on the land such as the fencing and rocking and bringing materials on for storage, Pelenaise simply said it had already been done by the time she saw the works. It was not until about March or April this year, that there were demands made on the defendant to stop using the allotment.

25. Pelenaise confirmed the approaches by Mr Tsai and that he had given her son $70,000 "for the allotment". Initially, she said she was not sure it was for a lease. However, after further questioning, she said she now knew it was for a request for lease of the allotment and that it occurred in June or July 2020. Pelenaise was adamant that that arrangement with Mr Tsai was not the reason for wanting to "cancel the arrangements with the defendant".

26. She denied ever going to the Ministry of Lands to lodge an application for lease in relation to the allotment. She said they went for a different matter namely to get the allotment registered in her son's name.

27. When she was asked about her understanding of the purpose of the payments received from the defendants, she said that they were for the defendant's use of the allotment, not for a lease.

Siosaia Kaukuloka Kupu

28. The next witness was the second plaintiff, Siosaia. His brief of evidence largely mirrored that of his mother's in terms of the background and his involvement in the case. He was present during the discussion in September 2017 with the security guard. He did not mention the presence of Sione Palu on that occasion. He said that at the time of that arrangement, he was 16 years of age and he went along with whatever his mother decided. He confirmed that the allotment was registered in his name in March this year.

29. In relation to the key events of 12 May 2018, Siosaia recounted how Mafi, one of the directors and main shareholders of the defendant, came to their house at 'Amaile, Kolofo'ou to request a lease of the town allotment. He confirmed that his mother

refused the request. However, he went on to describe a second meeting on or about 17 May 2018, when Mafi again requested to lease the town allotment by offering his mother a motor vehicle as a deposit.

30. The English copy of Siosaia's brief of evidence was cut off. Nothing turned on that as Siosaia was neither examined or cross-examined about that slight variation in his account at least as to the dates of conversations between his mother and Mafi and Palu. For reasons which will become clear below, it also has little bearing on the account given on behalf of the defendant in any event.

31. Siosaia was again about the agreement he had struck with Tsai. He confirmed that had he received $70,000 for a lease of the land and that he agreed that with Tsai before the demand was made in this case on the defendant to vacate. He said he told Tsai about the defendant occupying the land, but he did not tell Tsai to go and see the defendant.

32. When asked further about the agreement with Tsai, Siosaia said that the $70,000 was only a deposit and that the total price agreed for the lease was $250,000. He said that to receive the balance, he has to terminate the arrangements with the defendant. He confirmed that he has signed an application for grant of lease in favour of Tsai and that it was lodged with the Ministry of Lands about June or July this year.

33. Siosaia was questioned about copies of a number of text messages in which he asked Mafi for the various payments to the plaintiffs. In one particular message, late in the piece,[12] Siosaia wrote that the request on that occasion was to "come from Vaha's lease at Pahu". The defendant refers to that as evidence of the agreement for lease.

34. In a supplementary brief of evidence filed, Siosaia said that generally he was the one who was required to go and ask the defendant for money. He was required to text Mafi first. When Mafi approved the payment, Siosaia then went to the gas station where he was required to sign a piece of paper (elsewhere referred to as vouchers)

[12] Page 196 of the court book for the Tongan version and page 212 for the English.

as a receipt for the payments each time. He was not given a copy of those receipts. He said he understood that the payments were to "help us out" because the defendant was using their home by the security guard occupying it and using it as a watch house and later on as a storage and sale yard for its building material. He added that he and his mother were prepared to allow the defendant to use the property because they were living at his grandparent's home at 'Amaile, Kolofo'ou at the time and since.

'Anau Kaukauloka Siope

35. 'Anau Kaukauloka Siope is the daughter and eldest child of Pelenaise. She s recalled the events of Saturday 12 May 2018 when Mafi ('Charles Steward' as she knew him) and Palu ('Sione Muti' as she knew him) came to their home at 'Amaile and met with Pelenaise and Siosaia. She said they were seated outside the verandah beside the edge to the sitting room. Mafi was sitting beside the door. She was sitting inside the sitting room not far away from where he was sitting, and she listened to Palu and her mother talking". She heard Palu explain the reason for their visit was for their company to lease the allotment. Palu said that they could give her mother a lump sum amount of $50,000 if she agreed to lease the property to them and their company. She heard her mother clearly say 'no', that she was not interested in leasing the property, and there was mention of her brother being too young and that the property was not yet registered in his name.

36. 'Anau stated that during the conversation, Mafi fell asleep. She said that he appeared drunk and that even from the distance where she was sitting, she could smell liquor on him.

37. She went on to describe how Palu was "not put off" by her mother's refusal and he made a counteroffer of $80,000 for a 50 year lease. Again, her mother said "no" and that they were not interested in leasing the property. After he pressed Pelenaise for a time, 'Anau said that Palu then woke Mafi and apologized and said that they were leaving. Paragraph nine, she said she did not recall anything that was said but she

was absolutely certain and clear that her mother had not agree to any lease proposal.

Semisi Moala

38. The plaintiffs also called evidence from Semisi Moala who is a senior land registration officer with the Ministry of Lands and Natural Resources. Semisi's brief of evidence was only filed early on the morning of the first day of the trial. No objection was taken. In it, he said that he had been shown paragraph 9 of the brief of evidence of Steward Mafi where he stated that Semisi had advised them that the land had been held in trust for the second plaintiff as he was still underage and that as soon as he became of age, an application for lease could be submitted. Semisi denied that account and said that he never saw or advised Mafi. He did recall very clearly speaking Sione Muti Palu around the middle of 2018. Palu asked him to check whether the town allotment was registered under Siosaia's name and to follow the registration to complete it so that they could carry out their negotiations for a lease. Palu spoke to him twice. Semisi said that at the time he understood that the parties had not completed their negotiations for a lease because they wanted the town allotment registered to enable them to negotiate a lease. He was not the officer who worked on the registration of the allotment in Siosaia's name. That was done by a different officer in the Ministry. He found out later that the registration was completed on 20 March 2020.

39. Turning then to the defendant's evidence.

'Etiluna Mafi

40. 'Etiluna Mafi was referred to as the 'owner' of the defendant company. In his brief of evidence, 'Etiluna described Sione Muti Palu as "the manager of the defendant's gas station at Pahu". 'Etiluna recounted some of his history with Vaha (Pelenaise's late husband and Siosaia's father) and the tyre business he once ran before he passed away. In short, Vaha owed 'Etiluna money in relation to the supply of tyres. By the time of Vaha's passing, he had not been able to pay the amount owed, which

according to the defendant's records, totaled $8,072.82. 'Etiluna stated that the idea of leasing the subject land came about as a sort of payment of the outstanding debt. However, when Vaha died, he decided not to pursue a claim for the debt and instructed his staff to write the debt off. He said that the idea of leasing the subject land came up again in 2018 and that he left it to his son, Steward, to negotiate the lease. 'Etiluna was not involved in negotiating the lease. He said that Palu had advised him that the plaintiffs had agreed to lease the property to the company.

41. Mr. Edwards did not require 'Etiluna for cross-examination and his brief was received into evidence.

Charles Steward Mafi

42. Mr Mafi gave evidence that in 2018, Palu, who was the manager of the defendant's gas station on Fatafehi Road, asked him whether the defendant was interested in leasing the subject land. He responded that the company would be very interested. Palu then said he would arrange a time to meet with the owner of the land. After a few weeks, Palu advised Mafi that he had arranged a time to go and talk to the owner to discuss a lease.

43. Mafi could not remember the exact date he and Palu went to see Pelenaise. He referred to their house being at Fasi. He recalled that when they arrived, he and Palu went to the verandah to talk to Pelenaise. Palu knew her so he introduced Mafi to Pelenaise. After the introduction, Palu told Pelenaise and Mafi that he did not want to be present while they were discussing the lease, so he went outside.

44. Mafi said that he asked Pelenaise whether she was willing to lease the subject land and that she said 'yes' and that 'she would talk to her son about it'. He said they discussed consideration money. Mafi stated that Pelenaise wanted money and a new vehicle. He offered to pay $80,000 to which, he said, she agreed. She advised him that they had to wait until her son was of legal age which would be "in a couple of months". He said they then discussed the 'paperwork' for the lease and that it would be assisted by the defendant. He said they agreed that the defendant would

demolish the old house on the land and start construction work while waiting for the lease to be completed.

45. He denied 'Anau's evidence that he had fallen asleep at the meeting and that he was drunk. He stated that he came out of the meeting feeling happy and that he and Palu went back to the gas station.

46. Mafi stated that not long after the meeting, they arranged to go to the Ministry of Lands with the plaintiffs to start the process of applying for the lease. He said that Semisi Moala advised them that the land was "held in trust" for Siosaia as he was still underage but that as soon as he became full age, an application to lease could be submitted. He outlined later approaches to the plaintiffs about lodging an application for lease but said he "did not get any further progress with it".

47. He also gave evidence about the various payments made by the defendant to the plaintiffs and the process surrounding those payments concerning the vouchers and receipts referred to above. He also described the works that had been performed by the defendant on the land as mentioned above. The defendant intended to use the subject land for spare parts for motor vehicles. He stated that the defendant needed the subject land for its business.

48. Mafi confirmed his earlier affidavit evidence about his meeting in July 2020 with Tsai.

49. During cross-examination, Mr. Edwards made the point that Mafi's brief of evidence was only produced in English to which Mafi said that he understood English "only a little". In relation to his reference to the plaintiffs living at Fasi and whether he knew that area, he said that he did, but he wasn't sure where the plaintiffs' house was. All the other witnesses, including Palu, referred to the plaintiffs' house being at 'Amaile, Kolofo'ou.

50. Mafi confirmed in questioning from Mr. Edwards that both he and Palu went into the meeting with the plaintiffs, Palu introduced him to the plaintiffs and that he conducted the negotiations because when it came to "discussions about money", Palu went outside. When asked about the allegations that Palu was the one who did the

negotiating because Mafi had fallen asleep and was drunk, he denied that and said that although he did drink, "to his recollection", he was not drunk, and he had not been drinking that day.

51. There then followed in the cross-examination a number of instances where Mafi's answers were inconsistent with aspects of his two previous written accounts of his evidence namely his affidavit sworn22 July 2020 and his brief of evidence of 6 November 2020. For instance, in relation to the discussions with the plaintiffs, Mafi said that he asked them for the "maximum years" that they could give him for the lease. That was not put to either of the plaintiffs. In further answer to that, he said that he thought that the plaintiffs said 30 years and he then asked for more. At one stage, he said that Pelenaise said 50 years and that that was when she said she wanted money and a vehicle. Mafi said that he agreed to pay $80,000 not including the vehicle. He said that Pelenaise mentioned a car at a lot at Veitongo owned by the defendant. Mafi said that they could have any car they wanted at Veitongo and that the plaintiffs agreed to those terms. There was no mention by Mafi of the value of any vehicle that was to be included in the deal.

52. It will be recalled that in his brief of evidence,[13] Mafi said that Pelenaise said she was willing to lease the land to the defendant and that she would talk to her son about it. Elsewhere in his evidence, Mafi said that Siosaia was already at the meeting, which begs the question why in his brief he would say that Pelenaise said that she was going to talk to her son about it. Further, during cross-examination, Mafi did not mention the evidence in the same part of his brief about Pelenaise advising him that they had to wait for her son to be of legal age which would be in a couple of months. In answer to a question from the Bench, it became clear that Mafi did not know that Siosaia was already 16 years of age (and almost 17) in May 2018. Perhaps more bewilderingly, he never asked when Siosaia would turn 16.

53. Mr. Edwards also cross-examined Mafi about other inconsistencies with his earlier evidence including at paragraphs 10 and 11 of his affidavit where he deposed to the

[13] Paragraph 7.

terms agreed during the meeting (not in May but in August 2018) were for a lease of 30 years for $80,000. In his subsequent evidence and during cross-examination, he referred to the term being 50 years. Later in cross-examination about the term of the agreement for lease, Mafi said that he believed "we went up to 50 years". That was to be compared to his earlier affidavit evidence about the term being 30 years which was reflected in the defendant's pleadings.

54. There was no evidence that any vehicle has ever been given to the plaintiffs as part of the alleged agreement for lease or even as part payment or an advance towards the overall consideration said to have been agreed.

55. During cross-examination about the meeting at the Ministry of Lands, Mafi repeated that the purpose was to arrange the lease. He said that Siosaia's age only became clear during that meeting. He also said that it was clear from talking with the plaintiffs that the defendant was going to lease the land. He knew that neither of the plaintiffs was registered as the 'owner' or holder of the land but said he only heard that when he went to the Ministry. He did recall being told that when Siosaia turned 16, the lease arrangements could then proceed.

56. Mr. Edwards asked Mafi why, given that he was a businessman, was the alleged agreement for lease was reduced to writing. His only answer was that he had been "busy with work".

57. He was also asked when the $80,000 consideration money was to be paid. Putting the vehicle aside for the moment for reasons I have already mentioned, Mafi said the $80,000 was to be paid when Siosaia turned 16. That's when he was asked whether he knew when that would be, to which he replied that he thought he knew Siosaia was almost 16 but he found out later on at the Ministry that Siosaia had already turned 16.

58. Mr. Edwards asked Mafi in relation to the terms of the alleged agreement for lease what was the annual lease payment or rental agreed between the parties. Mafi said that it was not discussed. When he was asked whether the payments to the plaintiffs

were for renting the allotment or advances on the agreed lease payment. Mafi said that they were advances. From that, he agreed that the defendant had not paid anything for using the allotment and would not pay anything until the lease could be arranged.

59. During re-examination, Mafi confirmed that the defendant had employed a security guard for the gas station at Fatafehi road. He recalled either Palu or the security guard ringing him, and he told them to speak to the plaintiff about the use of the allotment. He said that later he saw the guard living in the house on the plaintiffs' allotment. However, he said he did not authorize any payments for the use of the allotment at that time.

60. Mafi told Mr. Fonua that the timing for the payment by the defendant of the $80,000 to the plaintiffs was never discussed. That is to be contrasted with his earlier evidence that the agreement was that the $80,000 was to be paid when Siosaia turned 16 which, of course, had already occurred on 1 June 2017.

61. Further during re-examination, Mafi was again asked about the meeting at the Ministry and references to having to wait until Siosaia turned 16. He was asked whether anyone at the meeting told him that Siosaia was already 16 and he said 'no'. When asked whether he ever asked anybody at the meeting when Siosaia would turn 16, again he said 'no'.

Asinate Tafolo

62. The next witness for the defendant was Asinate Tafolo. She was employed by the defendant as a gas station supervisor. She was first employed as a supervisor at the Fatafehi Road station from 2016 to 2019. She has since been moved to the station at Veitongo.

63. Asinate recalled that from 2018 to 2019 "the defendant was negotiating to lease the land which is next door to the gas station at Fatafehi Road, Pahu". She said that in 2018, she was told by her boss, Steward Mafi, that Siosaia would come to the gas station to collect money. He authorized her to give the funds to him, but she had to

get Mafi's approval each time Siosaia came. She described the procedure used each time monies were given to Siosaia including the issuing of a voucher which was used for the company's internal purposes. Most of those vouchers were marked as being for a lease concerning the Vaha property.

64. In cross-examination, Asinate was asked why that description for the payments had been entered on the vouchers. She said that Mafi told her to do so. Otherwise, nothing turned on Asinate's evidence.

Sione Muti Palu

65. The final witness called by the defendant was Sione Muti Palu. He appeared by video link from Fiji. In his brief of evidence, he actually did not describe his employment, other than "knowing the owner and the defendant very well" and that in relation the negotiations for the alleged agreement to lease with the plaintiffs, he described himself as the "middleman". Palu had knowledge of the plaintiffs' family including Vaha who he described as one of his friends and that Vaha's parents had been close with his family. He also gave evidence about Vaha owing money to the defendant earlier on before Vaha's passing and that that was part of the background to the initial discussions about offering to lease the allotment in question.

66. Palu stated that he discussed the suggestion of the lease with Mafi and the 'owner' of the defendant, 'Etiluna. He said that they were both very keen on the idea of leasing the town allotment. He said he was able to talk to Pelenaise who was also very keen with the suggestion of leasing the town allotment. He asked Mafi if he wanted the lease. Mafi said that he did. Palu arranged a meeting with the plaintiffs.

67. At the meeting, Palu said that he did not go inside because it would be better for Mafia to go by himself and talk to Pelenaise. Palu said that he stayed outside whilst Mafi went in. Palu did not know what Mafi and Pelenaise discussed.

68. Palu stated that when Mafi came out of the meeting, he looked happy and he told Palu that Pelenaise had agreed to lease the allotment to the defendant for $80,000 consideration money.

69. Palu also recalled going to the Ministry of Lands and talking to Semisi Moala. He said that Moala advised that the town allotment was held in trust for Siosaia and that the defendant would have to wait until Siosaia attained legal age, at which time, the lease application could then be lodged. That was the end of Palu's involvement in the matter according to his brief of evidence.

70. At one stage during his examination in chief, Palu referred to the security guard who had worked at the gas station and began to tell the court what the guard had told him about the initial arrangements with the plaintiffs. Mr. Edwards objected to the witness giving evidence of what the guard, Samiu, was alleged to have said. The objection was correct, and Mr. Fonua did not press the matter.

71. The security guard was not called in the proceeding. As it transpired, any evidence he might have given was likely to be material to the original dealings between the defendant or its employees or agents and the plaintiffs. Palu said that he did not know what arrangements were in place for the use of the allotment by the guard, but he did see the guard living there. He did not know who authorized it.

72. The cross-examination of Palu was interesting. As I mentioned at the outset of the review of his evidence, his brief did not contain a description of his employment or position within the defendant. Mr. Edwards put to him that he was the manager of all the defendant's gas stations. Palu denied that and said that he was just an employee. When Mr. Edwards refined that to him being the manager of the Fatafehi Road gas station, again Palu denied that and said that his wife was the manager of that gas station. That evidence is to be contrasted with the evidence of Mafi and his father, 'Etiluna, and their description of Palu as a manager of the gas station. It is unclear why Palu was not prepared to concede that. Instead, he preferred to say that those two members of the Mafi clan were "mistaken in their beliefs" as to what his position was in their employment. I found that quite bizarre. I can only infer that he was trying to avoid some level of responsibility for what has transpired in this case. But there is no need to speculate about that further.

73. Later in his evidence, when Mr. Edwards put to Palu the evidence of 'Anau and Pelenaise that Mafi was in fact not involved in the discussions because he fell asleep in the meeting and was drunk, Palu denied all that and said that those witnesses were lying under oath. Palu also said that before the May 2018 meeting, he had met with Pelenaise and that she was keen to discuss leasing the property. However, in in cross-examination, he said that at that meeting, she told him that she was keen to lease the allotment, but she was shy about going about it. He then said that he would go ahead with it, but he was not involved in any discussions as to terms. He confirmed that he did stay outside during the discussions because his task, he said, was only to arrange the leasing of the allotment. Therefore, he stayed outside. He said he told Mafi that he would not be there when they talked about the value and years of the lease.

74. Interestingly, at the end of cross-examination, Mr. Edwards asked Palu why he arranged the lease if he was not the manager of the gas station, to which Palu somewhat elliptically responded, he did most of the work in the company.

Submissions

75. Mr. Fonua provided both written opening and closing submissions which were most helpful. He identified the issues for the court to determine as being whether:

    (a) the plaintiffs are right in claiming that the defendant used the subject land for its security guard and there was no agreement for lease; or

    (b) the defendant is right that there was a verbal agreement to lease the subject land and the plaintiff are estopped from evicting it as it is entitled to judgment under ss 160 and 161 of the *Land Act*.

76. Mr. Fonua made reference to various passages of the evidence in support of the defendant's central contnetion that there was an enforceable agreement to lease with the plaintiffs. Those passages of evidence included that the plaintiffs only started asking the defendant for the various small and varied amounts of money from about September 2018, almost a year after the September 2017 agreement the

plaintiffs gave evidence about. Mr. Fonua submitted that that timing supported the defendant's argument that they had agreed to a lease earlier in 2018 and that requests for money were only made after that meeting.

77. When whether there was any evidence that the agreement allegedly struck at that meeting also included that the plaintiffs could come and ask the defendant for amounts of money from time to time as advances towards the agreed price of the lease, Mr Fonua not able to point to any evidence of such a term of the alleged agreement. He simply submitted that an inference was open that the payments after September 2018 were consistent with an agreement for the defendant to pay $80,000.

78. Nothing was mentioned in the submissions about a vehicle being offered to, requested by or given to the plaintiffs as part of the alleged agreement.

79. Mr Fonua also pointed to the single text message of many from Siosaia to Mafi, when he asked for funds from time to time, referring to it being for 'the lease for Vaha's land'.

80. I will pause at that point to observe that in this case a number of the main actors were not entirely precise with their use of terms such as rent, rental payments, lease and the like. It is not therefore possible to be clear about the weight to be placed on the use of any one of those terms, in particular, lease versus rent, and whether there was any conscious distinction between a lease as provided for by the *Land Act* and a tenancy or rental agreement which is not.

81. On the applicable legal principles, Mr. Fonua referred again to ss 160 and 161 of the *Land Act*. Section 160 requires that whenever any judgment of the court, from which no appeal has been taken, adjudges a person to be entitled to any land, the judge shall forward to the Minister a copy of such judgment. Section 161 provides the procedure for the Minister on receipt of a judgment in accordance with s. 160. Mr. Fonua explained that the references to those provisions was intended to mean that if the court finds in favour of the defendant that there is an enforceable agreement

for lease, it would declare that and then order specific performance requiring the plaintiff to proceed with the requirements for the submission of a signed application for lease to the Ministry. It transpired that Mr. Fonua actually intended that if the plaintiff did not abide by any such order, the Court would have to forward the judgment to the Minister and the Minister could then act on it by granting the lease in favour of the defendant.

82. In support of the central theme of his submissions that there is an enforceable agreement to lease between the parties, Mr. Fonua referred to his decision of Finnigan J in *Molitika v Vaitohi*[14] as an example where an agreement for lease had entered into and the defendant paid the plaintiff the agreed fee for the lease by "a drip fee process as and when demanded by the plaintiff". However, the decision in *Molitika* is demonstrably distinguishable from the facts in the present case because there the plaintiff pleaded that he was the registered holder of a town allotment which had been leased to the defendant in two separate agreements. Mr. Fonua was not able to identify any part of the judgment which cast doubt on the truth of that allegation. In the instant case, neither of the plaintiffs were the registered holders of the allotment in question at the time of the alleged agreement for lease. Further, nothing turns on the fact that in *Motilika*, the plaintiff was 16 turning 17 at the time of negotiating the agreement. Here, the alleged agreement was negotiated at a time when Siosaia was already 16 years of age.

83. The second part to the defendant's case, as submitted by Mr. Fonua, was an estoppel argument. After discussion with Mr Fonua, it became apparent that that part of the case relies upon a finding of the existence of an enforceable oral agreement for lease as constituting a representation by the plaintiffs that the defendant would be entitled to the land once it was registered in Siosaia's name and that the lease arrangements could then proceed. As I apprehend the submission, the defendant contended, that on the faith of that agreement, it then took possession of the land in 2018 and spent money on developing it and making the payments to the plaintiffs.

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[14] [1999] TOSC 69.

84. Mr. Fonua also submitted other possible alternative scenarios including that if there was no finding of the existence of an agreement for lease, the resulting relationship between the parties would be a tenancy agreement. In that event, the estoppel argument would have no foundation because there would be no representation in that circumstance as to a particular term on the facts of this case for which the defendant could have expected to remain on the property.

85. So too did an argument of estoppel by acquiescence depend for its success on a finding as to existence of the agreement for lease for fifty years. In that analysis, the fact that the defendant said that the plaintiff did not stop the defendant from developing the land and spending money on it could not be substantiated in my view having regard to the requirements for an estoppel as discussed by Chief Justice Paulsen in *Ngiaingini v Ngiaingini* [2018] TOLC 4 where he summarized the requirements to establish such an equity.[15] The first of five requirements for an equity of the kind relied upon by the defendants is an expectation or belief by, here, the defendant that is encouraged by the plaintiffs such as that the property is or will be the property of the defendant or that it has some other interest in it. In this case, that encouragement could only arise upon a finding of an agreement for lease as contended for by the defendant.

86. That then brings us to the critical issue in the case. Mr. Edwards submitted that the court should find that there was no such agreement. He relied primarily on inconsistencies in the evidence of Mafi and Palu about the meeting in or about May 2018. In particular, Mr Edwards identified the inconsistencies in Mafi's evidence on the three occasions now in which it has been recorded, namely, in his affidavit of July this year, his brief of evidence a few weeks before trial and his evidence during the trial. He said that Mafi's evidence was also inconsistent with Palu's evidence in material respects.

[15] From paragraph 35.

Consideration

87. Against that background, the starting point may be simply stated. The second plaintiff, Siosaia, is the registered holder of the allotment. He is prima facie entitled to vacant possession of it. In the absence any legal impediment to that right or other equity in favour of the defendant, Siosaia as entitled to possession of the allotment and an order for eviction of the defendant.

88. In order to establish a defence of the existence of an enforceable oral agreement to lease, the defendant needs to satisfy the court that:

    (a) firstly, on the balance of probabilities, the evidence shows that there was a consensus or meeting of the minds between the parties during the meeting in May 2018 as to the essential terms of the agreement as alleged; and

    (b) secondly, if that agreement is established, that it is legally enforceable as the basis for the relief it now seeks.

89. Having considered carefully the evidence of each of the main protagonists, namely, the two plaintiffs and Mr Mafi, in particular, and having seen them give their evidence firsthand, I am not satisfied on the balance of probabilities that there was any agreement for lease as alleged by the defendant. The plaintiffs were unshaken in their evidence that each of the offers made by Palu on behalf of the defendant (but according to Mafi, by him) were rejected. I have already mentioned something of the inconsistencies in Mafi's evidence. They were not ameliorated by the way in which he gave his evidence. At times, he was somewhat vague in his answers in cross-examination and, at other times, when he was being pressed about previous inconsistencies, he simply defaulted to the answers which best served the defendant's case. I did not gain any sense of assuredness or confidence in the accounts that he gave.

90. That lack of confidence in his evidence was compounded by the fact that throughout the entire alleged arrangement, not once did he reduce it to writing. For a businessman of Mr. Mafi's position, in a quite significant company in Tonga with a

number of holdings as mentioned albeit briefly during the trial, to not have reduced this agreement to writing in any way, shape or form whether by letter to the plaintiffs, an internal memo to the directors of the company, an instruction to the accounts department within the company in relation to the payments which were made to the plaintiffs, simply beggars belief. It was never explained by him how he could have bound the company to an arrangement which would see it have to pay the plaintiffs $80,000 plus a motor vehicle of some unspecified type or value and annual rents for the property which were never discussed, let alone agreed, without somehow engaging in writing. That did not assist the defendant's case.

91. Equally, his repeated evidence about the agreement turning on when Siosaia would turn 16 was unbelievable for the simple fact that he never asked when Siosaia would turn 16. How then, it may be asked rhetorically, could a businessman in that position know when the obligation to pay the agreed sum would fall due or for that matter when any steps could then be taken to secure the lease. Apart from thinking it might have been some months away, Mafi never asked. All the while, Siosaia had already turned 16 on 1 June 2017.

92. For those reasons, I prefer the evidence of the plaintiffs including the purpose of the meeting at the Ministry, which was to discuss the registration in Siosaia's name, not any application for a lease. In any event, those post contractual events are in my view only admissible to the extent of identifying whether an agreement was made, not as a basis for construing the terms of the agreement (if it had come into existence) or what it meant. In Australia, at least, the rule against post contractual conduct for the purpose of construing the terms of an agreement has been reasonably well-settled for many years.[16] In any event, neither counsel addressed that issue in this case.

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[16] For example, see the discussion of the Full Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [80] to [89] and the exceptions to the exclusionary parol evidence rule including resort to post-contractual conduct for the purposes of identifying the parties to a contract, the existence and subject matter of a contract and the terms of it. In the earlier decision on *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [108], the High Court considered it unnecessary in that case to resolve the controversy about the admissibility of post-contractual conduct even though differing views have been expressed in that Court, other Australian courts and overseas courts.

93. There finding of no agreement is sufficient to dispose of the case. However, if that finding may be considered elsewhere as erroneous, and there was an agreement between the parties in the terms contended for by Mafi, in my view, any such agreement is not legally enforceable.

94. Firstly, Pelenaise had no right, title or interest in the allotment by which she could confer or grant a lease of it. Section 56 of the *Land Act* is directly on point in this case. It provides that the registered holder of a town or tax allotment may grant a lease over the whole or part of his town or tax allotment provided that, relevantly, the holder is not a widow holding the tax or town allotment of her deceased husband. I also should mention, for completeness, proviso (iv), namely, that the period of any lease of the whole or part of a tax allotment shall not exceed 20 years. Pelenaise was not the registered holder of the allotment and she was a widow holding the allotment of her deceased husband. Vaha did not have the allotment registered in his name. Therefore, I find that Pelenaise did not have any interest in the property by which she could grant a lease over it.

95. Secondly, and similarly, Siosaia, who was of age at the relevant time, was not the registered holder of the allotment. He too had nothing to give, as it were, in May 2018. He had applied for registration of the allotment but that had not yet been completed. There is no evidence as to whether, as that May 2018, the Minister had made any decision on his application which could have been the basis for an argument that the allotment had been granted to him and that might have given him enforceable rights, but none of that has been raised in the pleadings or otherwise.

96. It is also significant to note that no application for the lease has ever been prepared by the parties or submitted to the Ministry.

97. I raised with Counsel at the outset of the trial whether, upon Vaha's passing, the allotment had reverted to either the Crown or the estate holder. That too had not been pleaded as an issue of dispute and was not advanced or explored during the

trial. I will therefore say no more about it. All the parties proceeded on the basis that Pelenaise and Siosaia were in possession of the allotment, they had a family connection to it and the defendant treated with them as if they had that right of possession but that is all. They were not registered landholders of the allotment as referred to in s.56.

98. Thirdly, and moreover, I find that any agreement as contended for by the defendant on Mr. Mafi's evidence would be void for uncertainty:

(a) There was no evidence as to when the $80,000 was to be paid. Mr. Mafi's evidence at one point was that it was when Siosaia turns 16. The fact was he was already 16. Therefore, that would make that term itself uncertain. That particular aspect was compounded as I have said earlier by the fact that Mafi never asked the very obvious question about when Siosaia would turn 16.

(b) There was no evidence as to any agreed annual rental payments on the lease for its duration.

(c) There was demonstrable uncertainty in the pleadings on behalf of the defendant, the affidavit by Mafi, his brief of evidence and then his viva voce evidence at trial about the period or term of the lease alleged agreed, and whether it was 30 or 50 years.

(d) There were differences in the evidence on price, namely $50,000 or $80,000.

(e) There were differences about whether the consideration included or did not include a motor vehicle. Even if one assumes there was discussion about a vehicle, there was no evidence about the value of the vehicle; whether it was to be of a value $200 or $2 million was completely uncertain.

(f) There was no evidence about the permitted purpose or use of the allotment which is an essential ingredient in the form of application for lease and a lease under the *Land Act*.[17]

99. One observation I make in passing about the defendant's case, which will eventually segue into the plaintiffs" claim for mesne profits or damages for the use of the property, is this: Mr. Fonua endeavoured to argue that the payments made by the defendant to the plaintiffs covered the period the defendant has been using the land. In my view, that is incorrect. On the defendant's own case, had there been a finding of agreement for lease, the price agreed (assuming it was $80,000 and putting aside the motor vehicle for the moment) could only have effect from the day of the lease once registered and therefore enforceable. In other words, it was a price which applied to the lease for a period contended for by the defendant of 50 years. It could not be said to be a payment, even in part by way of the various small payments to the plaintiffs, to cover any period when the defendant was using the land before the start of the lease. The corollary to that would be that it would have to be a term of the agreement that the lease would be backdated to the start of the defendant's possession of the land which it says was in late 2018. That was never part of the defendant's evidence.

100. Fourthly, during submissions and discussions about the defendant's case concept, Mr. Fonua, quite understandably, with respect, accepted that on closer analysis, the nature and terms of the agreement contended for by Mr Mafi really amounted to this: that once Siosaia was registered as the holder of the land, then he would give a lease to the defendant. The problem with that of course is nobody knew in May 2018 when Siosaia would become registered. Mafi didn't even know when Siosaia was going to turn 16, which of course he already had. In answer to a question from the Bench, Mr. Fonua agreed that that articulation of the defendant's case amounted to an agreement in May 2018 to, at a later unspecified point in time, once Siosaia was registered as the holder of the allotment, then enter into an agreement for lease. An

[17] Schedule IX.

agreement to agree is not unenforceable.[18] Neither counsel referred to any authorities in Tonga on this point.

101. That then brings us to what was the nature of the relationship between the parties upon a finding that there was no agreement to lease. As agreed by Mr. Fonua, the only other alternative is that there was a tenancy agreement between them for the use of the allotment. I find that from September 2017, when the guard (and possibly Sione Palu) approached Pelenaise about using the allotment for the guard's accommodation and as a watch house, the defendant has had the use of the allotment. That included further development of the allotment for the defendant's purposes from 2018 onwards.

102. Such informal tenancy agreement had no specified or express term as to duration or rental. That produces two consequences. The first is that the tenancy was terminable at will upon reasonable notice being given. The second would normally be that the rent payable would be a reasonable rent having regard to the nature and use of the property.

103. That characterization of the relationship then calls into question the nature and purpose of the monies paid by the defendant to the plaintiffs. For the reasons outlined above, I do not consider the payments were part of an amount of $80,000 as consideration money for the agreement for lease. The only other commercially sensible characterization of those payments is that they were rental payments for the use of the property.

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[18] Third category of case discussed in *Masters v Cameron* (1954) 91 CLR 353; *Booker Industries Limited v Wilson Parking (Queensland) Pty Ltd* (1982) 149 CLR 600; *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 *Plankton Australia Pty Limited v Rainstorm Dust Control Pty Limited* [2018] FCAFC 205 at [137]; *Walford v Miles* [1992] 2 AC 128; *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433.

104. The other feature of the tenancy agreement, as described above, is that the defendant had no tenure or security in terms of a definite period of occupation. Mr. Mafi could have (and it may be said with hindsight that he should have) protected the defendant's interests far better than he did, even on the agreement for lease case, by reducing it to writing. Not only did he not do that, he did not take any steps to secure the period of the tenancy agreement. Accordingly, any investment or money spent on the property or work done on it by the defendant as a mere tenant were at its risk. It also follows that any of those improvements or other assets applied to the property are the personal property of the defendant and remain its property and can be taken with it when it vacates.

105. Another consequence of the finding of a tenancy agreement is that there was no representation by the plaintiffs as to a term or duration of the tenancy which could have otherwise amounted to a representation upon which the defendant could have relied to induce it to spend money on the property and thereby have sought to estop the plaintiffs from an early termination; or, alternatively, claim damages for a breach of that term. Therefore, I find that even on that analysis there is no basis for any estoppel raised by the defendant.

106. Turning then finally to the claim for mesne profit. This is quite a vexed part of the case mainly because of, I am sorry to say, the poor way in which it has been addressed in the pleadings, evidence and submissions. I urge counsel in future to apply more attention and effort to any quantum aspect of a case involving a money claim, including the effects of possible alternative outcomes on liability.

107. Here, while the quantum claimed of effectively $750 a week was denied by the defendant in its pleadings, there was no serious challenge to the claim during the trial. However, there was no evidence to support that quantum. Mr. Edwards quite candidly conceded that that figure and other lower figures he posited were all unsupported by evidence. He finally retreated, as he had to with respect, to simply submitting that "the defendants had to pay something". With that much, I agree.

108. The formulation of the plaintiffs' claim in the Statement of Claim starts with the figure $120,000 for the period from 1 October 2017 to May 2020 at $750 per week. They then claim further payments of that sum per week until the defendant vacates. They then allow a credit or deduction for the amounts that the defendant has paid.

109. That approach, in my view, is misconceived because it amounts to seeking to renegotiate the tenancy agreement for which the plaintiffs did not specify a weekly or fortnightly rental sum. They were content to ask the defendant for such sums the plaintiffs needed from time to time. But, equally importantly, the defendant was content to pay them.

110. On the question of how much the defendant paid, I am more persuaded by the vouchers presented by the defendant totaling $49,550. They all in some way or another refer to lease payments for the property. But as I have stated earlier, I am not convinced that the author of those descriptions, whether originally instructed by Mr Mafi or Asinate Tafolo who wrote them, or either of the plaintiffs for that matter, intended the descriptions to have the legal significance of an enforceable lease as contemplated by the *Land Act*, or whether the term was just used interchangeably with rent under a tenancy agreement. I am satisfied that that documentary proof provides some independent or objective evidence of the amounts that have been paid. On the other hand, I am not satisfied as to Pelenaise's assertions in the tables she has presented about which monies were not received which she simply described as "not received" without any other evidence to substantiate that in the face of the vouchers from the defendant. Accordingly, I allow $49,550 as the total amount paid by the defendant to the plaintiffs.

111. The question then is: what do I do with that amount?

112. In my view, the fair and appropriate way of dealing with this question is to treat that amount as being what the defendant was prepared to pay and what the plaintiffs were prepared to accept for the whole period of use by the defendant from September 2017 to May 2020 when the plaintiffs demanded the defendant to vacate.

That comes to 2 years and 8 months or 32 months, which when divided into $49,500, amounts to $1,546 per month.

113. The plaintiffs have not been paid for the further now five months since the demand to vacate which was denied or resisted by the defendant. For that period of five months, multiplied by the monthly figure of $1,546, results in a total owing of $9,276. That, in my view, is a reasonable or appropriate award of mesne profits from the period since the demand to vacate in May this year till the date of judgment today.

Result

114. There is judgment for the Plaintiff.

115. The Defendant is to pay the Plaintiff damages in the sum of $9,276.00.

116. Further, the Defendant is to vacate the town allotment the subject of the proceeding within 42 days of the date hereof, and within that period, it is to remove any personal property belonging to it which it wishes to remove and without damaging the allotment.

117. The Defendant is to pay the Plaintiff's costs of the proceeding (other than those the subject of any previous order) to be taxed in default of agreement.

NUKU'ALOFA
24 November 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE