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IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY

LA 21 of 2019

BETWEEN:

**ANZ BANKING GROUP LIMITED**

Plaintiff

-and-

**JACINTA KOTO**

Defendant

-and-

**MINISTER OF LANDS**

Third Party

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Application by Third Party to strike out the Defendant's claim against him

## RULING

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC

Appearances: Mrs D. Stephenson for the Plaintiff

Mr D. Corbett for the Defendant

✓ Mr S. Sisifa S.G. for the Third Party

Date: 5 February 2021

### The application

1. Pursuant to Order 8 rule 8 of the Supreme Court Rules, the Minister of Lands applies to strike out the Defendant's third party claim against him.

### The Defendant's claim against the Minister

2. In essence, the Defendant claims that:

- (a) the Minister owed the Defendants a duty of care to ensure that the mortgage, the subject of the Plaintiff's claim herein, was registered in a timely manner;
- (b) the Minister breached that duty;

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- (c) as a result, the defendant has suffered loss and damage in the form of her increased indebtedness to the bank from the original loan amount of \$75,000 to now in excess of \$222,000; and
- (d) therefore, in the event the Plaintiff is successful in obtaining an order for enforcement of the mortgage, the Minister should be required to pay the bank the full outstanding balance of the Defendant's loan to the bank.

### **Submissions**

3. Mr Sisifa relied on detailed written submissions which focussed on the failure by the Defendant to properly plead any causal nexus between the alleged negligence on the part of the Minister and the loss claimed by the Defendant. By reason thereof, he submitted that the Defendant's pleading failed to disclose a reasonable cause of action, that it was frivolous and vexatious and was unclear.
4. Mrs Stephenson submitted that there are no provisions within the *Land Act* which support the existence of any statutory duty on the Minister as contended by the Defendant. She also joined with Mr Sisifa on the lack of causal nexus between the alleged breach and loss and damage.
5. The Defendant filed an affidavit in opposition to the application in which, among other things, she sought to identify inconsistencies within affidavit material filed on behalf of the bank and on behalf of the Minister as to when the mortgage was submitted to the Ministry as well as other issues concerning the discharge of the previous mortgage to the National Reserve Bank and the loss of the defendant's lease at some point in time. She also deposed to not being able to "pay out her mortgage" because her "mortgage is invalid".
6. On 2 February 2021, Mr Corbett filed a memorandum in opposition to the application which focussed on the alleged factual inconsistencies referred to by the Defendant in her affidavit. At 8:45 AM today, Mr Corbett emailed his submissions to the Registrar. Those submissions echoed the observations, comments and what were effectively submissions contained in his client's affidavit. No attempt was made to identify any causal nexus between the Minister's alleged breach and the Defendant's claimed loss and damage.

## Consideration

7. The third party claim is misconceived. Its fundamental premise erroneously conflates the Defendant's indebtedness to the bank pursuant to the loan agreement between her and the bank on the one hand and the rights and obligations which arise from the mortgage provided by the Defendant to the bank as security for the loan. The concept of "paying out a mortgage" was referred to during the hearing as a "misnomer of elision". The Defendant's obligations to the bank to repay her loan are separate from the rights and obligations arising under the mortgage. The only connection between them is that the mortgage provides security for the loan in the event of default in repayment by the Defendant as has occurred here. Therefore, even if the mortgage is, for some reason, invalid, that will have no bearing on the Defendant's obligation under the separate loan agreement to repay the loan according to the terms of that agreement. In that light, it can be seen that there is no such thing as "paying out a mortgage". A borrower/mortgagor may pay out the underlying loan which in turn will usually result in a discharge of the mortgage thereby permitting the mortgagor to redeem the equity in the subject land.
8. It follows that even if the Minister breached the posited duty of care to register the mortgage in a timely manner, any resulting delay in registration cannot affect the Defendant's obligation to repay the loan. If anything, such delay would be to the Defendant's benefit because it gave her more time to repay the loan (subject to accruing default interest) before the bank could seek to enforce the mortgage<sup>1</sup> by taking possession of the Defendant's interest in the land, which, by these proceedings, the bank is now endeavouring to do.
9. Another approach which leads to the same result is to consider the salient features of the common law duty of care postulated by the Defendant against the Minister. One of the abiding requirements for the common law's recognition of any novel duty of care in pure economic loss cases is that the loss or damage claimed be a reasonably foreseeable consequence of a breach of the claimed duty. In this case and putting the Defendant's pleaded case against the Minister

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<sup>1</sup> Section 103(4) of the *Land Act*.

at its highest, even if the Minister had breached the alleged duty of care, it is not reasonably foreseeable that that breach caused or could cause the Defendant's indebtedness to the bank pursuant to the loan agreement.

10. Further, there is no provision of the *Land Act*, nor could Mr Corbett point to any provision of the loan agreement or the mortgage or any other principle of law to the effect that the Defendant was relieved of any obligation to repay her loan (or conversely for the bank to continue to apply interest) until the security mortgage was registered.
11. After further exchanges with Mr Corbett about these matters and affording him a full opportunity to make any further submissions, Mr Corbett eventually conceded the fundamental error of conflating the loan with the mortgage, and thereby agreed that the claim against the Minister be withdrawn.

**ORDERS:**

12. The Third Further Amended Third Party Statement of Claim is struck out.
13. The Defendant's claim against the Minister of Lands is withdrawn.
14. The Defendant is to pay the Minister's costs of the proceedings to date, including of this application, to be taxed in default of agreement.
15. Whilst this application did not directly involve the Plaintiff bank, the outcome of it was likely to have some impact on the future conduct of the proceedings between the bank and the Defendant. Therefore, I am satisfied that the bank had a legitimate interest in being heard on this application. Accordingly, the Defendant is to pay the Plaintiff's costs of and incidental to this application, to be taxed in default of agreement.

NUKU'ALOFA  
5 February 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE