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Solicitor General

IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY

LA 13 of 2020

BETWEEN:

[1] MALIA TOPUI

[2] SIONE KIEAU TOPUI

Plaintiffs

-and-

FILIPE VEA

Defendant

MINISTER OF LANDS

Third Party

[1] PAUL SCHAUMKEL

[2] ANA SCHAUMKEL

Fourth Parties

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Plaintiff's application for summary judgment

## RULING

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BEFORE: PRESIDENT WHITTEN QC LCJ  
Appearances: Mrs F. Vaihui for the Plaintiff  
Mrs P. Tupou KC for the Defendant  
No appearance for the Third or Fourth Parties  
Hearing: 27 July 2022  
Ruling: 27 July 2022

### Introduction

1. On 13 May 2022, the Plaintiffs filed an application for summary judgement against the Defendant. The application was supported by an affidavit from the Second Plaintiff sworn on 13 May 2022. In opposition, the Defendant filed an affidavit sworn on 22 July 2022 and submissions.
2. At the conclusion of the hearing of the application on 27 July 2022, I delivered an *ex tempore* ruling, dismissing the application with a summary of reasons. Mrs Vaihu requested written reasons. These are those reasons.

### Background

3. The proceeding concerns a town allotment on Vuna Road in Kolomotu'a on which stands a double story house and outbuilding. The allotment is situated next door to the Defendant's residence and accommodation business known as the "Captain Cook Apartments". The allotment was registered to Tevita Topui, the wife of the First Plaintiff and father of the Second.

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4. The Defendant wanted to expand his business by using the neighbouring allotment and buildings. So, on 28 September 2012, he and Tevita entered into a tenancy agreement. The key terms of the agreement included a period of 25 years (expiring on 28 September 2037); rent payments commencing at \$1,800 per month for the first two years and then increased incrementally for subsequent periods to \$3,000 per month; an advance payment by the Defendant of \$5,400; if the rent was not paid within 30 days of the date it fell due, the agreement would be automatically cancelled; the tenant was to have insurance in place over the buildings; any improvements to the property were to remain at the end of the agreement; a formal lease was to be negotiated; and the parties' heirs and successors agreed to be bound to observe the agreement in good faith.
5. On 11 October 2012, Tevita passed away. His widow, the First Plaintiff, was unable to register her interest because at the time of Tevita's death, she was a naturalised U.S. citizen. Eventually, on or about 6 May 2019, the allotment was registered in the name of their second son (the eldest already having his own allotments), the Second Plaintiff.
6. By 10 May 2013, the Defendant had paid the Plaintiffs a total of \$200,000. There appears to be a dispute about the nature or purpose of those payments. The Defendant contends that they were advances for rent up to May 2020. The Plaintiffs appeared initially to regard the payments as a "bond" forming part of what were ongoing negotiations for the creation of a lease of the allotment, but which never transpired. There are other indications in the historical documents filed to effect that the Plaintiffs did in fact treat those monies as rent. Perhaps the best example of that was a letter from the Second Plaintiff to the Defendant dated 26 May 2020, in which he described the \$200,000 as having been "used completely towards the payment of monthly rental payments" and then demanded that the Defendant vacate the premises. In any event, the Plaintiffs say that the Defendant has not paid any rent to them since.
7. However, in or about June 2019, the Plaintiffs entered into an agreement with the fourth parties ("the Schaumkels") for a 50 year lease over the allotment and buildings. On 21 June 2019, Cabinet approved the grant of that lease, whereupon the Third Party ("the Minister") registered it.

8. On 27 August 2020, the Plaintiffs commenced these proceedings against the Defendant. In summary, they seek orders for the termination of the tenancy agreement, eviction of the Defendant (on the basis that the Schaumkels "wanted vacant possession") and payment of alleged outstanding rent, together with general damages of \$100,000. The claim for termination of the tenancy agreement is based on alleged breaches by the Defendant in failing to pay rent since May 2020, failing to have insurance in place over the buildings which have subsequently been damaged and because, so the Plaintiffs contend, the tenancy agreement is in contravention of section 13 of the *Land Act* ("the Act").
9. By his most recent Third Further Amended Statement of Defence And Counterclaim filed on 24 June 2022, the Defendant's position may be summarised as follows:
  - (a) the tenancy agreement is lawful;
  - (b) the lease is unlawful, and should be cancelled because he was not given an opportunity to be heard and the Minister did not make proper enquiries;
  - (c) he denies any breach of the tenancy agreement;
  - (d) the Plaintiffs refused to receive further rent payments he offered;
  - (e) he and his business have suffered financial hardship since the volcanic eruption and tsunami on 15 January 2022 and subsequent introduction of COVID-19 into Tonga (although the legal consequence or relief sought by reason thereof has not been specified); and
  - (f) if the tenancy agreement is terminated and he is required to vacate the property, then he claims damages including for amounts invested in the buildings and property and loss of income to the end of the tenancy period, totalling over \$2 million.
10. On 9 June 2022, the Schaumkels filed their reply to the Defendant's claims. In summary, they contend that:
  - (a) the lease is lawful;
  - (b) the Defendant does not possess any interest in land created or recognised by the Act;

- (c) the Defendant's tenancy has not been affected by the grant of their lease because they varied their agreement with the Second Plaintiff by agreeing to take the lease subject to the tenancy agreement provided the Defendant continues to pay the rent to them; and
  - (d) they have mortgaged their lease and there is nothing in the tenancy agreement which prohibits them from doing so.
11. On 10 June 2022, the Minister filed his response, which may be summarised as follows:
- (a) the tenancy agreement does not give jurisdiction to the Land Court;
  - (b) the tenancy agreement is illegal under s. 13 as it should have been submitted to the Ministry;
  - (c) the tenancy agreement does not create any title or interest in land, only a license to use the buildings on the land;
  - (d) the Minister cannot cancel a lease, only Cabinet can;
  - (e) the grant and registration of the lease were lawful;
  - (f) he had no knowledge of the tenancy agreement and therefore was not required to consult the Defendant or seek his consent prior to granting the lease; and
  - (g) he denies the Defendant was in possession and occupation of the premises when the lease was granted.
12. On 8 July 2022, directions were made culminating in a new trial date commencing on 17 October 2022, subject, of course, to the outcome of this application.

**The parties' contentions on this application**

13. The nub of the Plaintiffs' case on this application is that the Defendant has failed to pay them rent since May 2020 and has also breached his obligations in relation to insurance and keeping the buildings in good repair.
14. The Defendant denies that he is in breach of the tenancy agreement and says that he has an arguable defence which is reflected in a number of triable issues.

## Consideration

15. Order 15 rule 3 of the *Supreme Court Rules* permits a Plaintiff to apply for judgment on the ground that the Defendant has no defence to the claim, or any part of it.
16. The principles applicable to summary judgment applications are well-known and may be summarised from the decisions at first instance and on appeal<sup>1</sup> from *Australia and New Zealand Banking Group Ltd v Toloke* [2016] TOLC 1:<sup>2</sup>
  - (a) The purpose of the rules allowing summary judgment applications to be made is to enable a Plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the Defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.<sup>3</sup>
  - (b) The onus is on the Plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defence the Defendant will need to respond if the application is to be defeated.
  - (c) Whilst the Court will not normally seek to resolve genuine conflicts of evidence or assess the credibility of witnesses, the Court will not accept uncritically evidence that is equivocal, imprecise or inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable. The Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. The Court may take a robust and realistic approach when the facts warrant it.<sup>4</sup>
  - (d) The Court will not hesitate to decide questions of law where appropriate.
  - (e) Commonsense, flexibility and a sense of justice are required.
  - (f) In assessing a defence, the Court will look for appropriate particulars and a reasonable level of detailed substantiation. The Defendant is under an

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<sup>1</sup> *Toloke v Australia & New Zealand Banking Group Ltd* [2016] TOCA 10.

<sup>2</sup> Citing, in the main, *Bell v Bell* [2015] NZHC 3059.

<sup>3</sup> Citing *Anglo-Italian Bank v Wells* (1873) 38 L.T. 197 and *Westpac Bank of Tonga v Moehau* (Unreported Supreme Court of Tonga, CV 120 of 2011, 26 October 2012 Scott CJ).

<sup>4</sup> Citing *Krukziener v Hanover Finance Limited* [2008] NZCA 187 at [26] and *Eng Mee Yong v Letchmanan* [1980] AC 331, 341); *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.

- (g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.
- (h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.
- (i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the Court Rules which provide for the just, speedy and inexpensive determination of proceedings.
- (j) However, the Court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a Defendant. A Defendant should not be deprived of his right to contest a Plaintiff's claim at trial unless his defence is so clearly untenable or has no prospect of succeeding at trial that it must fail.<sup>5</sup>

17. After carefully examining the pleadings and affidavit material on this application, I am not satisfied that the Plaintiffs have clearly demonstrated entitlement to the relief sought. I am satisfied that the Defendant has an arguable defence and that there a number of triable issues which have not been, and cannot appropriately be, indubitably determined or despatched on the evidence or submissions advanced on this application. Those triable issues include, but are by no means limited to:

- (a) whether the Plaintiffs have standing to bring their claim against the Defendant following their grant of a lease to the Schaumkels in 2019;

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<sup>5</sup> *Moehau v Westpac Bank of Tonga* [2013] Tonga LR 71 at [17]; *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock.

- (b) whether the Plaintiffs can maintain an entitlement to rent after they granted the lease and the Schaumkels agreed to accept the lease subject to the Defendant's tenancy;
- (c) whether the Plaintiffs can maintain a claim for unpaid rent pursuant to a tenancy agreement that they contend is illegal;
- (d) whether the tenancy agreement is illegal (although that issue appears to have been answered by the Court of Appeal in *Yang v Manoa* [2016] TOCA 3);
- (e) whether the Second Plaintiff can rely on illegality in respect of an agreement proffered and entered into by his father and by which he allegedly agreed to be bound;
- (f) whether the Plaintiffs are estopped from denying the validity of the tenancy agreement;
- (g) whether there has been a valid legal or equitable assignment (or novation) of the tenancy agreement from the Plaintiffs to the Schaumkels;
- (h) whether the Defendant as a tenant has standing to challenge the validity of the lease and make a claim for its cancellation;
- (i) whether the lease is valid;
- (j) whether the Defendant, as a tenant, was entitled to, and whether the Ministry of Lands was required to afford the Defendant, natural justice and to make reasonable enquiries as to whether the land was available for lease;
- (k) whether the granting of the lease "effectively revokes" the tenancy agreement;
- (l) whether the Defendant is in breach of the tenancy agreement in respect of rent payments and if so, to whom (bearing in mind that the Schaumkels have, to date, not made any claim against the Defendant);
- (m) whether any failure by the Defendant to have insurance in place is a fundamental breach permitting the relevant landlord to terminate;

- (n) whether the Plaintiffs breached and/or repudiated the tenancy agreement by refusing or failing to accept further rent payments proffered by the Defendant and/or breaching any covenant of quiet enjoyment; and
- (o) whether, if the tenancy agreement has been terminated or is invalid, the Defendant is entitled to damages and, if so, whether they are to be set off against any order for unpaid rent or other amounts in favour of the Plaintiffs, in which case, in whose favour might be the balance.

18. I also take into account, as a discretionary factor, the Plaintiff's delay in filing this application almost two years after the proceeding was commenced and after the trial was originally commenced before Niu J. That delay was not explained. Such applications should be brought as soon as the Plaintiff has had a reasonable opportunity to assess any pleaded defence.

19. Further, where, as here, the pleadings clearly indicated that there were likely to be significant disputes on the facts and law, the application should not have been brought.

#### **Result**

20. For those reasons, the Plaintiff's application for summary judgment was dismissed with costs.

NUKU'ALOFA  
27 July 2022



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

M. H. Whitten QC  
LORD CHIEF JUSTICE