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IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY LA 7 of 2011

BETWEEN : 1. TEVITA TAULANGA FANGUPO
2. MELE LAVINIA UATA FANGUPO

- *Plaintiffs*

AND : 1. SNAP CONTRACTING CORPORATION
2. MINISTER OF LANDS

- *Defendants*

Mrs P. Tupou for the Plaintiffs

W. Edwards by the First Defendant

J. Lutui for the Second Defendant.

JUDGMENT

[1] On 8 July 1983 Frederick J. Hettig was granted a 45 year lease over a parcel of land with an area of about 895 square metres situated at the corner of Vaha'akolo and Mateialona Roads Kolomotu'a.

[2] On about 23 October 1991 approximately half of the land (the northern portion comprising about 447 square metres) was subleased to Dr Lei Saafi for the remainder of the term of the lease.

[3] On a day unknown prior to 1998 the southern remaining part of the land was subleased to Canton Bourke.

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[4] On about 26 February 1998 Canton Bourke's sub-lease was transferred to the Plaintiffs who went into occupation of the southern portion of the land and began construction of a two storey building there.

[5] According to the Second Plaintiff, shortly after the construction commenced she was approached by Mr Hettig who suggested that the Plaintiffs might like to acquire the head-lease of the whole of the land rather than confine themselves to the southern part of the land which they had acquired from Mr Bourke.

[6] According to the Second Plaintiff, Mr Hettig's proposal was accepted. Her evidence as to the consideration for the agreement was most unconvincing however nothing turns upon it. The lease was transferred to the Plaintiffs on or about 2 May 2001. By about this time the construction of the two storey building had been completed.

[7] It seems that the Second Plaintiff spent much of her time in the USA where she was studying. Prior to meeting Mr Hettig and signing the papers for the acquisition of the head-lease she had only been in Tonga for a short time and, soon after reaching the agreement with Mr Hettig she returned to the USA. Prior, however, to returning she did visit the Ministry of Lands in connection with the proposed transfer. She was told that there was no objection to the proposal.

[8] The Second Plaintiff's evidence was that when she agreed to acquire the head-lease she was aware that the northern part of the land was being occupied and that premises, including a shop, had been

constructed there. She was, however unaware of the precise nature of the occupation or the terms governing it. It appears that she returned to the USA, leaving the paperwork to be completed by Mr Hettig and there the matter rested for several years.

[9] In about 2007 the Plaintiffs returned to Tonga. The Second Plaintiff began to make enquiries about the occupants of the northern portion of the land which now belonged to her. In due course a very unsatisfactory state of affairs came to her knowledge.

[10] Following the acquisition of the sub-lease of the northern part of the land Dr Lei Saafi and his brother John built the shop and other buildings on their land. It appears that the brothers owned a company, the First Defendant. In August 1995 Dr Saafi's sub-lease was transferred to the First Defendant following Cabinet approval. In the same month Dr Saafi, the First Defendant and Mr Hettig entered into an agreement, the principal effect of which was that the annual rental reserved under the sub-lease was compounded by the payment to Mr Hettig of a lump sum of $15,000 in "full satisfaction of all annual rentals due and payable under the sub-lease at the date hereof and in the future". Furthermore, upon receipt of the lump sum payment "all annual rentals and reviews thereof shall immediately stop and shall not be recoverable in the future". A photocopy of the agreement dated 17 August was document 8 in the First Defendant's list.

[11] The existence of this agreement did not come to the knowledge of the Plaintiffs until, on 17 August 2007 their solicitor wrote to the First Defendant claiming unpaid rental at the rate of $1000 per annum said

to be owed to them under the terms of the sub-lease between Mr Hettig and Dr Saafi. By the same letter the Plaintiffs sought to increase the rent from $1000 per annum to $5000 per annum with effect from 26 June 2008. On 20 August the First Defendant replied. It rejected the claims and relied on the August 1st agreement.

[12] Proceedings were commenced in May 2011 and in an amended Statement of Claim filed in February 2014 the Plaintiffs claimed:

(a) Against the First Defendant:
   (i) An order for vacant possession of the northern part of the land occupied by the First Defendant;
   (ii) Loss of rental for 13 years at $5000 per annum amounting to $65,000.

(b) Against the First Defendant, in the alternative:
   (i) Unpaid rent at the rate of $1000 from 2001 to 2007;
   (ii) Unpaid rent at the rate of $5000 from 2008 to 2014.

(c) Against the Second Defendant:
   (i) Cancellation of the sub-lease held by the First Defendant;
   (ii) Compensation for loss of the use of the sub-leased land amounting to $25,000.

[13] The First Defendant's amended Statement of Defence filed in March 2014 relied on the August 1995 agreement the terms of which were said "to run with the land". Alternatively, the Plaintiffs were aware of the First Defendant's lawful occupation of their portion of the land and

accordingly should be deemed to have notice of the terms under which they enjoyed that occupation.

[14] The Second Defendant pleaded that the Plaintiffs were bound by the "pre-existing sublease" to the First Defendant and that there were no valid grounds for its cancellation; neither has any application to increase the annual rental approved by the Minister and Cabinet. In the premises there was no ground for any relief against the Minister.

[15] The trial took place on 6 August 2014, the Court being assisted by Mrs Assessor Koloamatangi. The witnesses were the Second Plaintiff, the Registrar of Lands, Semisi Moala and Dr Lei Saafi on behalf of the First Defendant. All documents discovered were produced by consent.

[16] Put simply, the Plaintiffs' case was that while the First Plaintiff was aware that the northern part of the land was occupied she was unaware that in the occupiers held a sub-lease and she was unaware that any agreement had been reached the effect of which was to deprive her of the rent due by the sub-lessees to her according to the terms of the sub-lease.

[17] The First Defendant's case is that it has a valid sub-lease, that it had paid the reserved rent in advance to the then head lessor, that it was unaware that the head lease had been transferred to the Plaintiffs and that it was not in breach of any of the terms of the sub-lease as amended by the 1995 agreement.

[18] It will be clear from the above that both the Plaintiffs and the First Defendant have an understandable grievance. The Plaintiffs assert their right to enjoy the benefits of the head-lease. The First Defendant relies on an agreement for value varying the terms of its sub-lease drafted by senior counsel and which he states was drawn to the attention of the Ministry. Why, having paid the rent in advance, should it be required to pay the rent again?

[19] Both counsel filed excellent written submissions which need not now be rehearsed in detail. Mr Tupou suggested that the First Defendant's sub-lease had not been registered according to the requirements of the Act and was, therefore, ineffectual. Furthermore, no variation of that sub-lease had been registered either and therefore it was equally ineffectual.

[20] Mr Edwards argued that the sub-lease to the First Defendant had been properly registered following Cabinet's approval, that the variation of the rental agreement should be regarded as a covenant "running with the land" but alternatively the Plaintiffs could not be regarded as bona fide purchasers without notice and were accordingly bound by the terms of the sub-lease, as varied, which by reasonable diligence they could have discovered.

[21] Before considering these submissions some observations about the requirements of the Land Act and the evidence of the Registrar of Lands must be made. As emphasized by Mrs Tupou Part VIII of the Land Act makes detailed provision for the registration of title and other interests in or over land. Sections 124 to 136 deal with leases and

sub-leases. Section 126 provides that lease and sub-leases are ineffectual to pass any interest in or over land until registered. Sections 127 and 128 specify how the registration is to be made. Section 129 provides that the original of the lease transferred or sub-leased must be endorsed. Section 135 requires "the register of documents affecting leaseholds" to be open to search or inspection. Notwithstanding those statutory requirements the head lease, while endorsed with a memorandum of the transfer of the lease to the Plaintiffs on 2 May 2001 and a memorandum of a mortgage dated 19 March 2004, does not disclose either of the sub-leases to Canton Bourke nor to Dr Lei Saafi nor the transfer of those sub-leases to the Plaintiffs or the First Defendant.

[22] According to the Registrar of Lands, the only way to find out that a lease is the subject of a sub-lease is to inspect not the register of leases but an entirely separate register of sub-leases. Furthermore, there is no cross referencing between the two registers. Which of these two registers is regarded by the Registry as conforming with the requirements of Section 135 is not clear.

[23] As has been seen, Dr Saafi's evidence was that the 14 August 2005 variation agreement (document 8 in the First Defendants production of documents) was drafted by counsel, witnessed by counsel and drawn to the attention of the Lands Registry. Paragraph F3 of the agreement reads as follows:

> "3. That the leaseholder and SNAP TONGA hereby agree that this agreement operates as a variation of the terms of the sub-

lease and if necessary to have the same registered under the provisions of the Land Act Cap 132 Law of Tonga."

[24] Notwithstanding this evidence, the Registrar told the Court that there was no copy of the August 14 memorandum at the Ministry and it is not in issue that no variation of the terms of the sub-lease are endorsed upon the original of that sub-lease. Although the Registrar told the Court that:

> "I believe that the Plaintiffs would have been advised that there was a sub-lease, it should have been done, and it would be surprising if someone bought a lease and was not aware of the sub-lease"

he was unable to refute the Second Plaintiff's evidence that when she visited the Ministry she was not advised of the existence of the sub-lease to the First Defendant. Neither was he able to explain how a reference to such a sub-lease, even had it taken place, would have disclosed the important variation to its terms agreed on 14 August 2005.

[25] Section 131 of the Act lists documents affecting leaseholds the registration of which is compulsory. The list does not include variations to sub-leases but it seems obvious from the list that the purpose of Section 131 is to protect the purchasers of leases from otherwise unknown encumbrances affecting their purchase. There is nothing to exclude the registration of other interests to which the lease is subject and there is nothing to prevent the registration of the

documents listed which affect sub-leases.

[26] *Megarry & Wade* "The Law of Real Property" 6th Edition states at paragraph 6-105 that:

> "The most fundamental principle of land registration is that the transferee of registered land for valuable consideration takes the legal estate subject to:
>
> (i) The entries in the register;
> (ii) Overriding interests; and
> (iii) In the case of disposition of leasehold, to all implied and express covenants, obligations and liabilities incident to the estate transferred or created but "free from all other estates and interests whatsoever".

[27] The purpose of a land registration system is to protect all concerned in the transfer of land against their interests being circumvented by hidden dealings. In the present case I agree with Mr Edwards that the amended covenant to pay rent would have "run with the land" had it been registered as was envisaged in paragraph F3 of the August 2005 agreement but do not accept that it is binding on the Plaintiff on the ground of notice.

[28] The Plaintiff accepted that she was aware of the development by Dr Saafi on the northern part of the land. She had, in other words, clear notice of their occupation. I do not however accept the argument that the notice of occupation implies notice of the precise terms of the

occupation, including the terms of the 14 August 2005 agreement. In my view the First Defendant is bound by the terms of the sub-lease as actually transferred to the Plaintiffs.

[29] As has been seen in paragraph 12 several alternative claims are advanced. It will be convenient to consider (b)(i) and (ii) first.

[30] (b)(i) is a claim for unpaid rent from 2001 to 2007. In my view the Plaintiff offered no satisfactory explanation for not making enquiries of the First Defendant as soon as she moved onto the land. Had she done so, is highly likely that she would have been advised of the 14 August 2005 agreement the validity of which could have been considered by the Court at that time. Instead of making reasonable enquiries of the First Defendant she allowed it to continue to occupy the land for a further 6 years, until 2007, without making any demand. In 2008 a rent increase was demanded without any previous discussion or notice. As a result of these delays by the Plaintiffs the First Defendant now finds itself with a rent demand of not less than $42,000. In my opinion this inactivity by the Plaintiffs is inequitable and they should not be able to take advantage of their failure to act in a more timely manner (see *Nelson v Rye* [1996] 2 All ER 186, 200).

[31] As to (a) (i) and (ii) I am not satisfied that there are any grounds for ordering vacant possession nor for increasing the rent prior to 26 June 2008.

[32] As to (c) I am not satisfied that the Plaintiff has shown that the Second Defendant had any grounds for cancelling the sub-lease and therefore

the claim against the Second Defendant fails.

[33] Taking all the circumstances into account I find:

(a) That the First Defendant is bound by the terms of the unamended sub-lease.

(b) That the Plaintiffs are entitled to recover rent at the rate of $1000 per annum from the date of demand in 2007;

(c) That subject to the requirements of the Land Act the Plaintiffs are entitled to apply for a variation of the rental from $1000 to $5000 per annum.

There will be no order for costs.

[34] Before leaving the matter I wish to express the view that the Land Registry urgently needs to examine whether the process for registering sub-leases presently followed complies with the Act and the reasonable requirements of stake-holders.

DATE: 14 November 2014.

SUPREME COURT TONGA

CHIEF JUSTICE

N. Tu'uholoaki
14/11/2014