IN THE LAND COURT OF TONGA **LA 11 of 2006**

NUKU'ALOFA REGISTRY

BETWEEN : AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

- *Plaintiff*

AND : MUMUI TATOLA

- *Defendant*

BEFORE THE HON. CHIEF JUSTICE AND MR. ASSESSOR BLAKE

Mrs. P. Tupou for the Plaintiff
Mr. Niu for the Defendant

JUDGMENT

[1] So far as agreed, the facts may be briefly stated, the Defendant is the registered holder of a tax allotment situated at Tofoa, Tongatapu. The area of the holding is 3.33 ha. (Defence Document D1 and D2).

[2] On a date unknown in 2003, one Viliami 'Alani Hoeft (Hoeft) submitted a Form of Application for Lease (Form No. 1 to schedule IX to the Land Act – Cap 132 – the Act; Doc. D1) in respect of 4047 square metres of the allotment.

[3] The first paragraph of the form is as follows:

> " I have the honour to make application for lease of certain property at Tofoa more particularly described below. The purpose for which I wish to put to use the said property is commercial and *residential"* (emphasis added).

[4] In addition to specifying the "area required", the term of 20 years and the annual rental of $4000.00 were also particularised. The Defendant endorsed his agreement to the application as grantor.

[5] On 18 September 2003 the application was forwarded to Cabinet (Doc. D3). On 23 September, 2003 Cabinet approved the application (Doc. D4). On 31 October, 2003 the lease, number 7095, was granted (Doc. D5).

[6] Several details of the contents of the lease (which is the usual Form 3 of schedule IX of the Act) may be noted. The consideration for the granting the lease is stated to be: "payment of the yearly rent that is recorded in this deed". The rent is stated to be $4000 to be paid on the 30th day of October each year.

[7] The lease contains the usual covenants. Covenant (c) has not been deleted although it is deleted by operation of section 4 of the Land (Amendment) Act 1999. It was also:

> "agreed by these presents if at the expiration of twenty one (21) days from the day the rent becomes due by the Lessee..... it shall be lawful for the Lessor or his successors to take possession of all or parts of the lands herein leased by this Deed or to sell by auction the houses or house or anything which may be on this land"

Earlier in the same paragraph it is stated that:

> "it shall be lawful for the Lessee, his heirs or those who represent him to remove all houses and improvements which may have been built on the said land"

[8] The lease also contains the usual Form 7 and Form 10 covenants. The first provides that the lessee will not erect any building on the demised premises without ministerial consent. The second provides for a rent review every five years. The diagram to the lease shows the area of the land to be 4048 square metres.

[9] On 31 October, 2003 (the same date as the lease was granted) Hoeft submitted a Form for Application for a Mortgage (Form 1 to schedule VIII to the Act – Document D9). The form contains a number of obvious errors. The period of the mortgage is stated to be "39 years and 11 months" when it should obviously have been "19 years and 11 months". The rent review was stated to take place on "31/12/2003" when the correct date was obviously 31 October, 2008. These clerical errors appear though out the documents in this case. They should have been avoided but too much should not be made to them. When the meaning of the document is clear they may be disregarded.

[10] A memorandum of mortgage (Form 2 in schedule VIII) is Document D10. A number of details must be noted. The first is that the "customer" is variously described as Hoeft or as "3H Company" the second is that the mortgager, Hoeft, mortgages not only the land comprised in lease 7095

but also “all buildings and fixed improvements thereon”. Thirdly, the “29 years 11 months” clerical error is repeated. Fourthly, the amount advanced was stated to be “Fifty thousand and Four Hundred Pa’anga (TOP$50,000)” (sic).

[11] The actual mortgage deed is Document D11 to 24. A number of fresh clerical errors appear, including a lease commencement date in October, 2000. There is no mention of a customer and the mortgagor is Hoeft. The endorsement of registration required by section 103 (3) of the Act is not signed by the Minister of Lands personally.

[12] It is not disputed that on a date close to the date that the lease and mortgage were executed, Hoeft and a number of associates moved onto the land and into occupation of a substantial concrete block dwelling house thereon already erected. He began operating a scooter import, sale, leasing and repair business from the premises. The business was named “3H’s Company Limited” and it was registered in July 2003 (Plaintiffs Document P3 and see also Additional Plaintiffs’ document P39-42).

[13] On 18 May, 2004 the Plaintiff sent Hoeft, qua director of 3H’s Company Limited (3H’s), a notice of demand in the amount of $61,060.15 plus interest and fees. In default of repayment the Plaintiff commenced proceedings against 3H’s. On 2 May, 2005 the Supreme Court gave final judgment in favour of the Plaintiff in the amount of TOP$63,397.89. (civil action no 854/04 – document D42).

[14] In reliance on Hoeft’s position as a director of 3H’s and the first paragraph of the mortgage, the Plaintiff gave “notification” both to the mortgagor, Hoeft and to the Minister of the intention to take possession of the mortgaged property in accordance with section 109 (1) of the Act. By now Hoeft had left Tonga and his whereabouts were unknown. The notification to him was by way of advertisement published in The Tonga Chronicle on 13 July, 2006: the notification to the Minister was by letter dated 3 August, 2006 (see exhibits “N” and “O” to an affidavit of Salome Po’oi dated 2 December, 2008 filed in support of an interlocutory application herein).

[15] According to Mrs. Po’oi, the Plaintiff became aware in April 2005 that Hoeft had not paid rent on the lease. According to the Defendant, Hoeft paid him $4000 “after the deed of lease was completed”. No other sum of $4000 was paid the following year. After it became aware that there were arrears of rent the Plaintiff paid two sums of $4000 to the

Minister of Lands in accordance with section 57(3) of the Act. The two original receipts were produced by consent. They were exhibited to Mrs. Po'oi's affidavit as Exhs. B and J and are numbered 27635 and 105768 respectively. The first payment was for the year October, 2004 to October 2005. The second payment was for the year October, 2005 to October, 2006.

[16] The Plaintiffs claim, as set out in the Amended Statement of Claim filed on 7 August 2008, is that the Plaintiff obtained legal possession of the mortgaged lease, including the house standing on the land, when Hoeft failed to respond to the notice of default within the stipulated 14 day period. Despite obtaining legal possession of the land, the Defendant has not allowed physical possession to take place but has instead installed his own tenants in the house. The Plaintiff seeks a declaration that it is the mortgagee in possession of lease 7095 and that the Defendant is not entitled to enter or interfere with the "premises containing lease 7095". It also seeks damages arising from what is said to have been unlawful letting of the premises since they were vacated by Hoeft.

[17] The Defendant raises a number of questions of law, of fact and of mixed law and fact. They are as follows:

(i) The lease was of the land only, and did not include the house;
(ii) Since the lease did not include the house, Hoeft had no right to include the house in the mortgage;
(iii) The mortgage was in any event invalid (a) because of the numerous errors made in its preparation and (b) because sections 99 and 103 of the Act were not complied with;
(iv) The lease had already been terminated by the Defendant before the Plaintiff purported to enter into possession.

[18] The trial took place on 28, 29 October and 9 November 2010. The Defendant gave evidence. He told me he was aged 82 and a retired medical practitioner. He accepted that he had leased a portion of his allotment to Hoeft but told me that this agreement did not include the house. The house was the subject of another agreement, an agreement in writing, that Hoeft was to pay him $100,000 in advance for renting the house for the 20 year duration of the lease. The Defendant told me that although it had been agreed that this sum would be paid to him upon the registration of the lease, nothing had ever been paid. The Defendant was asked if he had a copy of this agreement. The Court adjourned to allow

him to look for the copy which he thought he might have at home. The following day the Defendant told me that he had searched at home. He thought he might have had a copy in his closet, but everything had been washed away in the cyclone. Mr. Niu told me that his original file in the case had also been lost. Despite Hoeft breaching the agreement to pay $100,000 for the use of the house, it was the Defendant's case that he had allowed Hoeft to remain in possession until he re-entered.

[19] The date and nature of the re-entry are problematic. Paragraph 5 (b) of the Statement of Defence states that the Defendant "entered and took possession of the land of the lease and notified a representative of the Lessee on the premises to vacate the land and the Defendant's building on the land on 2/4/2004". In Mr. Niu's written submissions dated 16 November, 2010 the date is given as "2/4/05 [when] the Defendant repossessed the building". In his letter of 31 May, 2005 addressed to the Minister (Document D43) Mr. Niu advised the Minister that he had been instructed by the Defendant that he had re-entered "the land" on "1st May 2005 [and had] terminated this lease".

[20] The significance of the date and nature of the re-entry lies in the possible effect on the two payments made by the Plaintiff to the Ministry which have been described in paragraph 15 above. It is not disputed that Hoeft had not paid the rent for the lease which become due on 31 October, 2004. Since he was in arrear the lessor's right to terminate the lease was activated. If the Defendant purported to exercise that right he could arguably only do so if arrears still remained unpaid. If the arrears were paid on Hoeft's behalf before the date the Defendant re-entered, his right to re-entry would arguably have been lost.

[21] The Defendant was questioned at length about when the re-entry took place. He produced some copies of diary entries (Documents D25 to 40) in support of his claim to have re-entered on 2 April. His entry for 2 April reads as follows:

"I decided to put a stop to Alan Hoeft use of my property because of wrong use of the trust deed and our agreement. Langi complains of not being paid by Hoeft for his work for over a year.... the house is full of broken scooter parts and 83 bodies without machine. In other rooms are scooters for repair but not yet. I told Langi to do all he could for those as today I will call all who has any business or rights to come and take it. I went to 'Ofa and paid the Radio Tonga to announce 3 x one in each day at evening of my intention".

On 4 April the diary records that the Defendant made a further assessment of the damage and took a number of photographs.

[22] I accept this evidence which is uncontradicted. The fact that Langi, an employee of Hoeft, may have continued working at the house for some time after 2 April does not, in my view, affect the fact that the Defendant had re-entered and had assumed control of the house. Two questions however arise. The first is whether the Defendant had a right to re-enter and the second is whether his re-entry had determined the lease. The answers to these two questions in turn raise further and difficult questions: was the house comprised in the lease? If not, was it the subject of a further agreement between the Defendant and Hoeft? If so, what was the nature of that agreement?

[23] In *Cowley v Tourist Service Ha'api Ltd & Anr* [2007] Tonga L R 183 the Court of Appeal explained that:

> "In Tonga, the law of fixtures, as understood in other common law countries, has been somewhat modified, so that buildings are not, in general, regarded as fixtures. They are treated rather as "chattel houses" are in Barbados – that is to say, as personal property detachable from the land: *Kalo v Bank of Tonga* (Court of Appeal 7 August 1998); *Mangisi v Koloamatangi* (Court of Appeal 23 July 1999); *Bank of Tonga v Kalo* (Ward CJ, 21 April 1995".

In *Kalo v Bank of Tonga* (supra, somewhat strangely, reported at 1997 Tonga L R 181) the Court said:

> "Buildings, as Ward CJ pointed out.... have been regarded as items of personal property rather than forming part of the realty. Because of the constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although all the implications have not yet been worked out, and their working out should be left to the process of development of the law of Tonga case by case, we think the broad proposition stated by Ward CJ should be accepted. That means that it was open to Mr. Kolo to pledge his house to the Bank as an item separate from the land on which it stood".

[24] After the hearing concluded the Court visited the Defendant's allotment and was shown the land which had been leased to Hoeft and the house which stands upon it. As already noted, it is a substantial

concrete dwelling standing some feet from the nearest edge of the demised land. It was not removed from the land by the Defendant before the lease was executed. It would not be possible to remove it from the land without first demolishing it. If it were removed then there would be no other premises upon the land which could provide alternative residential accommodation envisaged when the lease was applied for and granted. In his letter to the plaintiff solicitors dated 28 July, 2005 (Doc D 45 and 46) Mr. Niu asked:

> "How was a buyer, a sub-lessee or a mortgagee to deal with a building which lawfully belonged to the lessor but which is situated on the land of the lease being sold, sub-leased or mortgaged?" and
>
> "What is the purchaser of Mr. Hoeft's lease going to do about my client's building on the land of the lease which he will buy from your client?

[25] To these rhetorical question may be added: how would the Defendant be able to exercise the usual rights of an owner without trespassing on the leased land? Supposing the tenant in the house failed to pay rent on the house but kept up to date with the rental due under the lease, how could possession of the house be lawfully effected?

[26] To my mind there is only one possible answer to these questions: although the *ownership* of the house remained throughout with the Defendant, the *use* of the house passed to the lessee, together with the land on which it stood. By deciding not, for obvious reasons, to remove his house from the land before he parted with possession of the land, for the duration of the lease, the lessor has to be seen to have accepted that he had also parted with possession of the house. That possession could only be re-assumed once the land reverted to him after the lease came to an end. This is because he could not lawfully enter the land, merely to take possession of the house, not only because he had to cross the land to reach the house but also because the house, as a matter of fact, stood on the land which he had leased. So long as the lease was not determined, the lessee was entitled to the house's use. In *Sanft v Tonga Tourist and Development Co Ltd & Ors* [1981-1988] Tonga L R 26, the Privy Council stated:

> "[We] wish to emphasise that equitable principles can apply only to leasehold interests after they have been validly granted. Such

principles have no other application to any other title, claim or interest in any other Tongan interest in land".

The right to use property to the exclusion of the legal owner is a typical equitable right.

[27] Since it is my view that the breach of any separate agreement for the rental of the house could not confer any exercisable right on the Defendant to repossession, it is not necessary for the Land Court to examine any further the agreement which the Defendant claimed to have reached with Hoeft. It is sufficient to note that the written agreement could not be produced, that such agreements are invariably required to be in writing (Statute of Frauds 1677) and that the consideration, $100,000, never paid, appears not to be consistent with the consideration appearing in the lease (see Evidence Act – Cap 15 – Section 78 & 79). Whether, in these circumstances the Defendant would be in a position to prove the existence of a separate contract would be a question for another court to decide.

[28] At the very end of his evidence, the Defendant was shown Defence Document D43. He confirmed what he had told the court earlier: when he re-entered the premises he did so because of the noise and other disturbance which had come from the house; he did not re-enter because the rent had not be paid. He also confirmed that he was not re-entering the land with the aim of determining the lease, he understood that only the Minister could do that. He told me that the claim, set out in Mr. Niu's letter D43, that he had determined the lease was "completely wrong".

[29] This evidence from the Defendant is, of course, the evidence of a layman; it does not settle the question whether in law the lease was determined at any time by the Defendant or his agents.

[30] As has been seen, Mr, Niu suggested that in Tonga there is no requirement for notice to be given before the lease can be terminated for arrears of rent, all that was required was the 21 day period included in the lease. I do not agree. The observations of the Privy Council in *Sanft* have already been noted; equitable principles apply once leases have been granted. In equity, the proviso for re-entry on non payment of rent is regarded as merely a security for the rent (*Belgraria Insurance Co Ltd v Meah* [1964] 1 QB 436; [1963] 3 All E R 828). Provided the landlord and other persons interested can be put in the same position as before, the tenant is entitled to be relieved against forfeiture on payment of the

outstanding rent and any other expenses to which the landlord has been put. In my view, this principle applies equally to leases in Tonga.

[31] In the present case it is accepted that no notice of failure to pay rent was given and that in fact the arrears of rent were paid by the Plaintiff to the Minister as required by section 57 (3) of the Act. The Defendant's intention, as explained to the court, was not to determine the lease, but to evict Hoeft from his house. In my opinion the lease has not been determined.

[32] There remains the mortgage. Mr. Niu suggested that it was invalid because of the numerous clerical errors and because the Minister had not signed the registration personally (see paragraph 11 above). In my view the clerical errors, though regrettable and, I would imagine, the cause of some shame to the Plaintiff, do not present any problem of construction and accordingly do not affect the rights of the parties.

[33] The second argument is also, in my opinion, without merit. In *Carltona Ltd v Commissioner of Works* [1943] 2 All E R 560, 563A, the Master of the Rolls explained the way in which government and the functions of ministers take place:

> "The duties imposed on ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department."

In my view this is also the position in Tonga (and see also *Johnson v Osenton* L R 4 Ex. 107).

[34] In all the circumstances the court is of the view that the Plaintiff is lawfully in possession of the land comprised in the lease, including the land upon which the house stands, and also the use of the house itself.

[35] There will be judgment for the Plaintiff in terms of paragraph A, B, C, E & F of the Amended Statement of Claim. It is not clear to me how paragraph D has been calculated and therefore if this aspect of the claim is maintained the court will need further submissions.

DATED: 28 January, 2011 **M D SCOTT**
CHIEF JUSTICE