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IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY **AM 15 of 2018**

BETWEEN: **TANIELA MAFILE'O FUA**

- Appellant

AND : **DE XING CONSTRUCTION CO. LTD**

- Respondent

BEFORE HON. JUSTICE NIU

Counsel **:** **Mr. W. C. Edwards Snr SC for appellant**
: **Mr. D. Corbett for respondent**

Hearing date **:** **29 October 2018**
Judgement date **:** **30 October 2018**

JUDGEMENT

1. The appellant has a registered lease no.8074 of 1.233 hectares of land at Tofoa, Tongatapu from 23/8/2011 to 22/8/2061 with an annual rent of $1,500, with the Crown as lessor.

2. The respondent has a registered sub-lease of 1960 square meters (IR 37.4p) of the land of the appellant's lease. It was registered Book 1 Folio 226 on 14/1/2013 to run from 14/1/2013 to 14/1/2043 with an annual rent of $1,500, payable to the lessee of lease no.8074 (the appellant).

3. On 24 November 2017, the appellant filed his claim against the respondent claiming arrears of annual rent totalling $3,000. The respondent denied any such arrear of rent, claiming that there was a verbal agreement between the appellant and the respondent prior to the grant and registration of the sub-lease that the annual rent of the sub-lease was to be only $500, and that after the sub-lease was registered, only $500 was paid each year and was accepted by the appellant without complaint, but that in 2017 the Ministry of Lands required that the rent payment of the sub-lease be paid to the Land Office and so the whole sum of $1,500 was then paid in 2017. The appellant denied that there was any such verbal agreement, and if there was any such agreement it was ineffective to change the express annual rent of $1,500 provided for in the sub-lease.

4. The trial was held in May 2018 and the Magistrate made his decision on 19 July 2018, after submissions were filed by counsel, in which he found that it was likely that there was an understanding between the appellant and the respondent that the rent was only to be $500 per annum because that was the only rent paid from 2013 to 2016. He accordingly dismissed the appellant's claim.

5. The appellant has now appealed to this Court against that decision upon the grounds that:

   (a) The Magistrate erred in finding that there was a likelihood of an understanding that the annual rent was to be only $500 because there was a payment on 30/11/2015 for $500 and another payment on the same date for another $1,000; and that the other payments were always late part payments only;

   (b) The Magistrate erred in applying the verbal understanding to contradict or vary the terms of payment contained in the deed of sub-lease;

(c) The Magistrate erred in failing to consider the evidence of the Ministry of Lands that the payment of rental was always required to be paid to the Ministry, and was not a change of policy.

6. Both counsel filed written submissions. In Mr. Corbett's submissions, he stated that there was a written agreement signed by the parties on 26 July 2012 that the rent of the sub-lease be only $500 per annum. I asked Mr. Corbett for that agreement but he did not have it. I have to say it was not produced or referred to in the Magistrate's Court either. I do not accept that there was a written agreement to that effect.

7. I asked Mr. Corbett whether such a verbal agreement was superseded by the agreement signed by the parties, namely the deed of sub-lease in this case and which was registered on 14/1/2013 and he said it was not. I put to him that surely it was agreed by both parties when they signed the sub-lease application form that the annual rent be $1,500, and he said that the owner's son had signed the form without the knowledge or consent of the owner. That of course is irrelevant to the validity of the amount of rent agreed to by the company because there is no claim that the son had no lawful authority to sign for the company.

8. I asked Mr. Corbett whether I had any authority to change what was stated in this registered sub-lease to be the annual rent to be the rent verbally agreed upon instead. He said yes and he referred me to the case of *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA 443. I informed Mr. Corbett that that case only confirmed the law of contract that a contract can be lawfully made by conduct of the parties which was in accordance with the contract which was written and signed by only one party, and it was distinguishable from the present case where the parties have signed the application form agreeing to $1500 p.a and then signing the deed of sub-lease which confirmed that the rent be $1,500 p.a.

9. I asked Mr. Corbett whether he was aware of the provisions of the s.79 of the Evidence Act (the parole evidence rule) that a written agreement could not be changed by a verbal agreement which is inconsistent with the terms of the written agreement, and he said yes, but that this was an unfair agreement of sub-lease because it meant that the respondent was paying, in effect, the whole sum of the annual rent of the head-lease of $1,500 whereas he is only sub-leasing a third of the land of the head-lease. He said that that was why the parties agreed that the company would pay only one-third ($500) of that rent as its annual rent. That is not correct. The area of the sub-lease (1960m²) is in fact only 15.89% of the area of the head lease (12,330m²). There cannot have been any such basis for said agreement, if there was one, albeit verbal.

10. I told Mr. Corbett that sitting as the Supreme Court, I had no authority to find that the deed of sub-lease was invalid for any reason, and that I had to accept that it was a validly registered sub-lease duly issued under the Land Act, and that only the Land Court had the authority to adjudicate any dispute over any terms or rent of any interest in land, such as a sub-lease. Mr. Corbett then stated that his client would now file his claim in the Land Court.

11. I then asked Mr. Corbett if he had anything further he wished to say and he said no. I then informed both counsels I would give my written reason for my decision and adjourned the hearing.

Reasons

12. The deed of sub-lease is an agreement of the parties in writing. Furthermore, it is required by law, the Land Act, to be in writing in the form prescribed (subject to such variations as may be required) and must be registered under the Act. This sub-lease was so registered.

13. That deed provides that the annual rent be $1,500.

14. By verbal agreement between them, they purported to agree that the rent of the sub-lease be only $500 per annum instead, and the respondent says they

complied with it because it paid only $500 and the appellant accepted it in each year. The Magistrate accepted that it was likely that there was such an agreement and dismissed the appellant's claim.

15. He, the Magistrate, was wrong to do that because he ought not to have allowed any evidence of such verbal agreement to contradict or vary the terms of the written and registered lease. Section 79 of the Evidence Act provides as follows:

> "79. Save as in this section hereinafter provided where any transaction has been reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to such document or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:
>
> Provided that
>
> (a) Evidence may be given to any fraud, duress, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, error in date, mistake of fact or any other matter which would invalidate the document or entitle any person to any order or relief relating thereto.
>
> (b) Evidence may be given to any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms if the Court from the circumstances of the case infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them;
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> (c) Evidence may be given of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a document;
>
> (d) Evidence may be given of any distinct subsequent oral agreement to rescind or modify the terms of a document provided that the transactions set out in the document are not required by law to be put in the form of a document;
>
> (e) Evidence may be given of any usage or custom by which any incident not expressly mentioned in any agreement is annexed

to contracts of that description unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract;

(f) Evidence may be given of any fact which shows in what manner the language of a document is related to existing facts.

16. None of those six provisos to s.79 applies to warrant the allowance of the said verbal agreement of $500 rent per annum to be admitted into evidence to contradict or vary the annual rent of $1,500 to only $500.

17. The provisions of s.79 is mandatory. It provides that no evidence shall be admitted. The evidence admitted must accordingly be disregarded. There was not then and there is not now, any evidence of any such agreement, and the defence of the respondent to the appellant's claim fails and the claim must be upheld.

Orders

18. Accordingly, I make the following orders:

(a) The appeal is upheld and the judgement of the Magistrate's Court is set aside.

(b) There be judgement for the appellant for the amount of his claim in the sum of $3,000.

(c) The respondent shall pay the costs of the appellant in this Court and also his costs in the Magistrate's Court, to be taxed by the Registrar, if not agreed.

SUPREME COURT TONGA

L.M. Niu J
J U D G E

NUKU'ALOFA: 30 October 2018.